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Supreme Court, U.S.
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In The

Supreme Court of the United States

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DANTA DAVIS,

Petitioner,

v.

DENNIS STRAUB, Warden,

Respondent.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTION PRESENTED FOR REVIEW

DID THE SIXTH CIRCUIT APPLY AN EXTREMELY NARROW STANDARD OF REVIEW UNDER 28 U.S.C. § 2254(d)(1) REGARDING WHAT CONSTITUTES "CLEARLY ESTABLISHED FEDERAL LAW" CONTRARY TO SUPREME COURT JURISPRUDENCE, AN ISSUE ON WHICH THERE IS CONFLICT IN THE DECISIONS OF THE COURTS OF APPEAL, AND HAD THE CORRECT STANDARD BEEN APPLIED THE WRIT WOULD HAVE BEEN GRANTED?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Danta Davis prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which affirmed the district court denial of his petition for writ of habeas corpus.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit on rehearing, affirming the denial of the petition for writ of habeas corpus, is reported at 430 F.3d 281 (6th Cir. 2005), and is reprinted in the Appendix at pages App. 1-35. The April 21, 2006, amended order of the Sixth Circuit denying Petitioner's timely petition for rehearing with suggestion for rehearing *en banc* is reprinted in the Appendix at pages App. 36-46. The first opinion of the Sixth Circuit reversing the district court denial of a writ is reported at 421 F.3d 365 (6th Cir. 2005), and is reprinted in the Appendix at pages App. 47-70. The unpublished opinion of the Michigan Court of Appeals affirming Petitioner's conviction and the trial court's denial of petitioner's motion for new trial, *People v. Danta Davis* (Docket No. 207725), is reprinted in the Appendix at 71-77. The Order of the Michigan Supreme Court denying leave to appeal from the decision of the Court of Appeals is reported, *People v. Danta Davis*, 464 Mich. 872, 630 N.W.2d 621 (2001), and is reprinted in the Appendix at App. 78.

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JURISDICTION

The Sixth Circuit Court of Appeals affirmed the district court's denial of the petition for writ of habeas corpus on December 1, 2005, and denied Petitioner's timely motion for rehearing and suggestion for rehearing *en banc* on April 21, 2006. On June 22, 2006, this Court granted Petitioner's motion to extend the time for filing a petition for writ of certiorari to August 10, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which in pertinent part reads as follows:

> . . . nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

It also involves the Sixth Amendment to the Constitution of the United States, which in pertinent part provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

It also involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . .

It also involves 28 U.S.C. § 2254:

> **28 U.S.C. § 2254 State custody; remedies in Federal courts.**
>
> * * * *
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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STATEMENT OF THE CASE

Procedural History

Petitioner Danta Davis was convicted on September 19, 1997, following a jury trial in Genessee County, Michigan, Circuit Court of three counts of first degree murder and related offenses. Petitioner was sentenced on October 30, 1997, to life without parole for the murder counts, MCL 750.316, 13 to 20 years consecutive for home invasion, MCL 750.110a(2), 6 to 10 years concurrent for mutilation of a body, MCL 750.160, and three to five years concurrent for receiving and concealing stolen property, MCL 750.535. Petitioner filed a timely Claim of Appeal and a timely motion for new trial in state courts. The motion was denied by the trial court in an order issued January 22, 1999, after an evidentiary hearing held the same day.

Petitioner's convictions were affirmed by the Michigan Court of Appeals in an unpublished opinion issued December 26, 2000. *People v. Danta Davis*, (MCOA Docket No. 207725). The Michigan Supreme Court denied leave to appeal in a standard one sentence order issued June 26, 2001. *People v. Danta Davis*, 464 Mich. 872, 630 N.W.2d 621 (2001).

Petitioner's timely petition for writ of habeas corpus was denied by the United States District Court for the Eastern District of Michigan. The Sixth Circuit initially reversed the District Court in a 2-1 opinion issued September 1, 2005, and ordered that the writ be granted. *Davis v. Straub*, 421 F.3d 365 (6th Cir. 2005). On December 1, 2005, the Sixth Circuit granted the state's petition for rehearing, reversed itself, and affirmed the denial of the writ. *Davis v. Straub*, 430 F.3d 281 (6th Cir. 2005).[1] The Sixth Circuit initially denied Petitioner's petition for rehearing with suggestion for rehearing *en banc* in an order issued March 30, 2006, and then in an amended order on April 21, 2006, over a dissent by six Circuit judges.

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[1] The District Judge on the panel, sitting by designation, changed his vote but did not author an opinion in either decision.

Statement of Facts

Danta Davis was convicted of three counts of first degree murder and related offenses in connection with the murders of Sheila Jones and her two young children in Flint, Michigan, in 1996. Davis and co-defendant Nathan Bell were convicted in a joint trial before separate juries.

The prosecution theory of the case was that Davis and Bell acted together. Davis' theory of defense was that Bell was crazy and killed Jones and the children by himself, and that Davis assisted Bell only in disposing of Jones' body out of fear of retribution from Bell and his family if he refused. Bell confessed to the murders, but attempted to shift blame to Davis. (Bell's confession was introduced only before Bell's jury, not Davis'.) Davis did not confess and maintained his innocence in his trial testimony. No physical evidence linked Davis to the murders. DNA evidence linked only Bell to the murders of the children.

The case against Davis was based principally on the testimony of two of Bell's brothers and two of their friends, who, like Bell, tried to shift the blame to Davis and minimize Bell's involvement. Bell's brother, Chude Snow, and his friends Riley Williams and Darryl Guster, claimed they were present at the scene when Sheila Jones was murdered. They testified for the state, and while they claimed they were present at the scene at the time of the murder of Jones, they were not threatened with prosecution.

However, the defense was not allowed to present the testimony of Damaris Jourdan. Jourdan was the only other person present at the scene besides Davis and Bell. Jourdan was called by the defense to corroborate Davis' testimony. After Jourdan took the witness stand and the prosecutor suddenly said he was a potential defendant,[2] he refused to testify.

Jourdan's pre-trial statements strongly tended to exonerate Davis. The statements were exchanged in pretrial discovery. Jourdan made two voluntary non-custodial statements to police approximately one week after the murders, the second one *Mirandized*. In his first statement, Jourdan said Bell alone beat Jones and dragged her into the garage. In his second statement Jourdan elaborated somewhat and said that just before he left the scene, he heard Jones breathing in the garage and saw Bell standing nearby holding a screwdriver. Jourdan told Bell, "Leave her alone," to which Bell responded, "She saw my face."

Ten months later, Jourdan gave a detailed statement to a private investigator working for Davis' lawyer. This statement was consistent with Jourdan's statements to police. Jourdan said that Bell told him that he planned on killing Jones' children (who were in their home down the street), because they knew where their mother had gone, and that Bell asked Jourdan to go with him to kill them. Jourdan refused and left before Jones was killed. He repeatedly told the investigator that neither he nor Davis had hit or stabbed Jones and that Davis was not even outside to witness the violence. His eyewitness account is consistent with Davis' trial testimony. Jourdan's account exonerated himself and strongly tended to exonerate Davis of murder.

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[2] Although the prosecutor took this position at trial, it was inconsistent with the prosecutor's pretrial treatment of Jourdan. The prosecutor had subpoenaed him as a witness for the preliminary examination, although he was not called. The prosecutor also listed him as a witness for trial, even though Michigan law does not require alleged accomplices to be listed.

Unaware that the prosecutor would prompt Jourdan to assert a privilege, trial counsel identified Jourdan by name in his opening statement and told the jury to expect to hear him recount the version of events above. Jourdan was on the pre-trial witness lists of both the state and the defense.

During trial, when Jourdan was called by the defense and sworn in as a witness, the prosecutor requested a sidebar conference. The judge excused the jury, and, in Jourdan's presence, the prosecutor announced that Jourdan was a suspect in the case and should be informed of his Fifth Amendment rights before testifying. After questioning Jourdan briefly, the judge appointed counsel for Jourdan. Jourdan's lawyer invoked his Fifth Amendment privilege against self-incrimination in blanket fashion and said he would refuse to testify. The trial court ruled, erroneously, that it was up to the witness to determine whether he had a privilege. Over defense objection, the trial court did not order Jourdan to return to the stand and allow him to invoke the privilege as to individual questions.

The trial continued without Jourdan's testimony, and both Davis and Bell were convicted and received multiple life sentences. No charges were ever brought against Jourdan in connection with the case.

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REASONS FOR GRANTING THE WRIT

I. CONTRARY TO SUPREME COURT JURISPRUDENCE, THE SIXTH CIRCUIT APPLIED AN EXTREMELY NARROW STANDARD OF REVIEW UNDER 28 U.S.C. § 2254(d)(1) REGARDING WHAT CONSTITUTES "CLEARLY ESTABLISHED FEDERAL LAW," AN ISSUE ON WHICH THERE IS CLEAR CONFLICT IN THE DECISIONS OF THE COURTS OF APPEAL, AND HAD THE CORRECT STANDARD BEEN APPLIED THE WRIT WOULD HAVE BEEN GRANTED.

A. Introduction

Prior to the state decision in this case, this Court had set forth "clearly established federal law" regarding the relevant aspects of the Sixth and Fifth Amendments. The Michigan Court of Appeals *per curiam* opinion here was contrary to that law, because it failed to recognize or apply the governing principles, and to the extent it recognized them, it unreasonably applied them.

On rehearing in the Sixth Circuit, the majority held that since the Supreme Court had never decided a case dealing with the constitutional principles at issue here in a case involving virtually indistinguishable facts, even though the legal principles on the issues is settled, a writ may not issue. The opinion takes an extremely narrow view of what constitutes "clearly established federal law", and in so doing conflates the "unreasonable application" and "contrary to" prongs of 28 U.S.C. § 2254, contrary to this Court's jurisprudence.

The decisions of the various Circuit Courts are in clear conflict regarding how to determine what constitutes "clearly established federal law." The statutory language and this Court's decisions to date have "not provided enough guidance to the federal district and appellate courts which regularly grapple with determining what constitutes clearly established law."[3] Consequently, the definitions "lack the necessary precision to guide the lower federal courts, which currently do not share a common understanding of what constitutes clearly established law."[4] This Court has not yet addressed the issues posed in this case and should grant certiorari to resolve the conflict.[5]

B. The AEDPA Standard of Review Does Not Limit Relief to Cases Factually Identical to Supreme Court Decisions.

Under 28 U.S.C. § 2254(d)(1), a court may grant the writ of habeas corpus where a state court judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." To determine what constitutes "clearly established" law, courts look to the law established by Supreme Court holdings. *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

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[3] Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 Catholic University Law Review 747, 750 (2005).

[4] *Id.* at 751.

[5] *Carey v. Musladin* (Docket No. 05-785), *cert. grntd.*, __ U.S. __ (2005), currently pending in this Court, poses a similar issue, but from a perspective opposite this case. In *Carey*, the state's petition for certiorari was granted to address whether the Ninth Circuit gave "clearly established" too broad a reading.

Certiorari should be granted and this case consolidated with *Carey*, because this case provides an opportunity to address ***all*** the issues on the subject, including the conflict between the circuits, whether the extremely narrow reading of "clearly established" federal law used in this case conflates the "contrary to" and "unreasonable application" prongs of 2254, and whether such a narrow reading is unconstitutional.

However, "[s]ection 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S. Ct. 1166, 1175, 155 L. Ed. 2d 144 (2003). The term "holding" for purposes of § 2254(d)(1) is not limited to bright-line rules and narrow statements like "judgment for defendant" but instead refers to "the governing legal principle or principles set forth by the Supreme Court" designed to apply to a range of factual contexts. *Id.* at 71; *Williams*, 529 U.S. at 407, 120 S. Ct. 1495 (observing that an unreasonable application of clearly established federal law occurs when a state court decision "unreasonably refuses to extend [a legal] principle to a new context where it should apply").

An explicit statement from the Supreme Court is not necessary; rather, "the legal principles and standards flowing from [Supreme Court] precedent" also qualify as "clearly established law." *Ruimveld v. Birkett*, 404 F.3d 959, 1010 (6th Cir. 2005). "[A] federal court may grant relief when a state court has misapplied a governing legal principle to a set of facts different from those of the case in which the principle was announced" (internal quotation marks omitted). *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct 2527, 156 L. Ed. 2d 471 (2003). "A legal principle, by definition, applies to diverse factual scenarios. And those factual scenarios can differ in innumerable ways, so long as they are analogous on the point to which the legal principle applies." *Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006) (King, J., dissenting from the denial of rehearing *en banc*).

Consequently, federal courts have found clearly established law even where Supreme Court precedent does not rest factually "on all fours." *Lewis v. Johnson*, 359 F.3d 646, 655 (3rd Cir. 2004). "[T]he Supreme Court precedent need not be directly on point, but must provide a 'governing legal principle' and articulate specific considerations for the lower courts to follow when applying the precedent."[6]

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[6] *Quinn v. Haynes*, 234 F.3d 837, 844 (4th Cir. 2000) (citing *Williams*, 120 S. Ct. at 1523). *See Bradley v. Duncan*, 315 F.3d 1091, 1100 (9th Cir. 2002) (determining petitioner "need not produce a 'spotted calf' on the precise issue at hand to warrant habeas relief . . . Rather, it is sufficient that the due process violation here offends the principles previously enunciated by Supreme Court precedent and reaffirmed by our case law."); *Ryan v. Miller*, 303 F.3d 231, 248 (2d Cir. 2002) ("[i]n determining whether a right is clearly established [for purposes of § 2254(d)(1)], we note that although the Supreme Court must have acknowledged the right, it need not have considered the exact incarnation of that right or approved the specific theory in order for the underlying right to be clearly established."); *Cox v. Miller*, 296 F.3d 89, 101 (2d Cir. 2002) (rejecting State's contention that petitioner should not prevail because his claim was that state court violated the Establishment Clause by failing to extend cleric-congregant privilege to his communications with members of Alcoholics Anonymous and "the Supreme Court has never addressed the relationship between 'the clergy privilege and the First Amendment'" on grounds "that the prohibition of official discrimination against religions is undoubtably 'clearly established.'").

See also Taylor v. Withrow, 288 F.3d 846 (6th Cir. 2002); *Hart v. Attorney Gen. of the State of Florida*, 323 F.3d 884, 893 n.16 (11th Cir.

(Continued on following page)

However, this Court has noted that "[a]t the same time, the difference between applying a rule and extending it is not always clear. Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado, supra*, at 541 U.S. at 666.

C. There is a Conflict in the Circuits Regarding What Constitutes Clearly Established Federal Law.

The cases noted in Part IB, *supra*, clearly conflict with the Sixth Circuit decision in this case as to what constitutes clearly established federal law, as do numerous other opinions of the various Circuits.[7] There is clearly a conflict between, and even within, the Circuits regarding how to determine what is clearly established federal law, and what value to place upon the decisions of the lower federal courts in determining federal law.

Federal courts have variously described a rule of law as "clearly established" by Supreme Court precedent when

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2003); *Burdine v. Johnson*, 262 F.3d 336, 354 (5th Cir. 2001); *Torres v. Prunty*, 223 F.3d 1103, 1110 (9th Cir. 2000).

[7] There are also clear conflicts within some of the Circuits, but the Circuits have not acknowledged the tension between such decisions. Compare, for example, the decision in this case with *Lakin v. Stine*, 431 F.3d 959 (6th Cir. 2005), where three sitting Circuit judges held – contrary to this case and just eighteen days later – that "[n]evertheless, an explicit statement by the Supreme Court is unnecessary; rather, 'the legal principles and standards flowing from [Supreme Court] precedent' also qualify as 'clearly established law.'" (Citations omitted.) *Cf. also Smith v. Stegall*, 385 F.3d 993, 998 (6th Cir. 2004).

it "dictate[s]"[8] a particular result or has "established . . . standards to guide courts."[9] That the rule set forth by the Supreme Court's precedent may "'of necessity require a case-by-case examination of the evidence' obviates neither the clarity of the rule nor the extent to which the rule must be been seen as 'clearly established' by this Court."[10]

The analysis becomes more complicated when the lower federal courts recognize a principle of law as settled, or established, but the facts of the case are not on all fours with the Supreme Court decision from which the principle was derived. 28 U.S.C. § 2254(d) expressly contemplates that the legal principle at issue must have been recognized by the Supreme Court itself, and cannot be found solely in lower court decisions.[11] Nonetheless, a majority of circuits have concluded that a habeas court need not limit itself solely to Supreme Court case law. These courts have held that a circuit court decision may represent "clearly established

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[8] *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 1512, 146 L.Ed.2d 389 (2000).

[9] *See Taylor v. Withrow*, 288 F.3d 846, 852-53 (6th Cir. 2002) (concluding right of a criminal defendant to assert self-defense rests on "clearly established Federal law" even though "there is no Supreme Court decision unmistakably setting down this precise rule . . . This is an example of rara avis: a fundamental rule dictated by precedent but 'so unexceptional that it [has] never been drawn into question in a reported case."); *Nevers v. Killinger*, 169 F.3d 352, 362 (6th Cir.), *cert. denied*, 527 U.S. 1004 (1999).

[10] *Williams v. Taylor*, 529 U. S. 362, 391, 120 S. Ct. 1495, 1512, 146 L.Ed.2d 389 (2000) (quoting *Wright v. West*, 505 U.S. 277, 308, 112 S. Ct. 2482, 120 L.Ed.2d 225 (1995) (Kennedy, J., concurring)).

[11] *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L.Ed.2d 389 (2000) ("§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.").

Federal law" if that decision is a "gloss on"[12] or amplification of[13] a decision of the Supreme Court, or "rests entirely upon Supreme Court precedent."[14] Indeed, circuit court decisions "may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and may also help determine what law is 'clearly established.'"[15] Thus, in some circuits the courts may consider

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[12] *Evans v. McBride*, 94 F.3d 1062, 1065 (7th Cir. 1996), *cert. denied*, 519 U.S. 1131 (1997).

[13] *Davis v. Kramer*, 167 F.3d 494, 500 (9th Cir. 1999), *vacated on other grounds*, 120 S. Ct. 1001 (2000) (Mem.); *Matteo v. Supt., SCI Albion*, 171 F.3d 877, 888-889 (3d Cir.) (*en banc*), *cert. denied*, 120 S. Ct. 73 (1999).

[14] *Fern v. Gramley*, 99 F.3d 255, 260 (7th Cir. 1996).

[15] *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000). *See also Rashad v. Walsh*, 300 F.3d 27 (1st Cir. 2002); *Chia v. Cambra*, 281 F.3d 1032, 1037 (9th Cir. 2002) (same); *Phoenix v. Matesanz*, 233 F.3d 77, 83 n.3 (1st Cir. 2000) ("Although decisions issuing from this Court are not 'clearly established' for the purposes of § 2254(d)(1) because they do not issue from the Supreme Court, they provide significant insight on what constitutes reasonableness for a particular fact pattern"); *Copeland v. Washington*, 232 F.3d 969, 973 (8th Cir. 2000) ("'[t]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness . . . of the state court's treatment of the contested issue.'"); *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000) ("Juxtaposing precedent from this circuit alongside the trial record convinces us that" petitioner has demonstrated prosecutorial misconduct); *Goins v. Angelone*, 226 F.3d 312, 326-27 (4th Cir. 2000) (looking to circuit court precedent to conclude that petitioner's claim is not dictated by clearly established federal law); *Knox v. Johnson*, 224 F.3d 470, 482 (5th Cir. 2000) ("because the state court reasonably relied upon the law of this Circuit, we must defer to their conclusions"); *Lewis v. Miller*, 220 F.3d 485, 490 (7th Cir. 2000) (concluding circuit court precedent "stands as a strong indication that the view the Supreme Court of Indiana took . . . was a reasonable one . . . and certainly was not contrary to existing Supreme Court decisions"); *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000) (reaffirming *Duhaime* following this Court's decision in *Williams*);

(Continued on following page)

federal court of appeal decisions *explicating* Supreme Court precedent in determining whether the state court's decision was an unreasonable application of federal law as determined by the Supreme Court under § 2254(d)(1).[16]

Lajoie v. Thompson, 217 F.3d 663, 668 n.6 (9th Cir. 2000) ("It is appropriate to look to lower court decisions to determine what law has been 'clearly established' by the Supreme Court and the reasonableness of a particular application of that law.").

[16] *See Mountjoy v. Warden*, 245 F.3d 31, 35-36 (1st Cir. 2001); *Ouber v. Guarino*, 293 F.3d 19, 26-27 (1st Cir. 2002); *Williams v. Bowersox*, 340 F.3d 667 (8th Cir. 2003); *Copeland v. Washington*, 232 F.3d 969, 974 (8th Cir. 2000) (noting that circuit precedent "provide[s] a framework for analysis . . . in this case"); *Cossel v. Miller*, 229 F.3d 649, 654 (7th Cir. 2000) (looking to factually similar decision by court of appeals to determine if trial counsel's performance was ineffective); *McGregor v. Gibson*, 219 F.3d 1245, 1255-56 (10th Cir. 2000); *Atley v. Ault*, 191 F.3d 865, 871 (8th Cir. 1999) ("To the extent that 'inferior' federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the state court's reasonableness of the state court's resolution of the disputed issue."); *Bryson v. Ward*, 187 F.3d 1193, 1205 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1566 (2000); *Dickerson v. Vaughn*, 90 F.3d 87, 90-91 (3rd Cir. 1996) (holding state court decision contrary to federal law as articulated in Supreme Court case and court of appeals decisions); *Williams v. Johnson*, 171 F.3d 300 (5th Cir.), *cert. denied*, 120 S. Ct. 197 (1999) (same); *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998) (holding that "to the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue"); *Richardson v. Bowersox*, 188 F.3d 973, 978 (8th Cir. 1999) (same), *cert. denied*, 120 S. Ct. 1971 (2000); *McBride v. Johnson*, 118 F.3d 432 (5th Cir. 1997) (in determining what law is "clearly established," under § 2254(d)(1), court considers seminal Supreme Court case of *Morrissey v. Brewer*, 408 U.S. 471 (1972), as well as court of appeals decisions that have "added some flesh to the basic *Morrissey* framework"); *Fern*, 99 F.3d at 260; *Davis v. Kramer*, 167 F.3d 494, 500-01 (9th Cir. 1999) (relying in part on Ninth Circuit precedent that was "simply an amplification of" the Supreme Court's decision in *Anders v. California*, 386 U.S. 738 (1967)), *vacated on other grounds*, 120 S. Ct. 1001 (2000).

On the other hand, some Circuits, including the Sixth Circuit, have held that "[t]he AEDPA prohibits the use of lower court decisions in determining whether the state court decision is contrary to, or is an unreasonable application of, clearly established federal law."[17] For example, in *Bell v. Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000), the Court held that circuit law has no precedential effect, but "[a]t best it constitutes a body of constitutional dicta." *See also Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir. 1996) (federal courts are not permitted to apply circuit law but must look exclusively to Supreme Court cases).

The conflict between the decisions of the Circuit Courts on this issue is noted in the pleadings filed in this Court in *Carey v. Musladin*, *supra*, and is discussed at some length in *Seeking Clarity in the Federal Habeas Fog*, *supra*, n.3, at 788-816. This Court should grant certiorari to resolve the conflict.

D. Had the Correct Standard Been Applied, the Writ Would Have Been Granted.

The Sixth Circuit decision here erred in two major respects. The Court applied an incorrect standard of review in its insistence that there be Supreme Court precedent factually on all fours before relief could be granted. *Davis v. Straub*, *supra*, 430 F.3d at 287. In doing so, the Court erroneously conflated the "contrary to" and "unreasonable application" clauses.

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[17] *See Miller v. Straub*, 299 F.3d 570, 578-79 (6th Cir. 2002); *Mitzel v. Tate*, 267 F.3d 524, 531 (6th Cir. 2001); *Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000); *Arnett v. Jackson*, 393 F.3d 681, 688 (6th Cir. 2005). As noted in footnote 8, *supra*, the Sixth Circuit has not been consistent on whether and to what extent consideration of precedent from courts other than this Court is permissible.

1. The Sixth Circuit Erroneously Conflated the "Contrary to" and "Unreasonable Application Clauses.

This Court has held that the clauses yield two separate categories of analysis. *Taylor*, 529 U.S. at 405, 120 S. Ct. 1495. A state court decision is "contrary to" federal law as determined by the Supreme Court, and so may be set aside on federal habeas review, if it "applies a rule that contradicts the governing law set forth in our cases" or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Taylor*, 529 U.S. at 406, 120 S. Ct. 1495.

Alternately, a state court decision may be set aside as an "unreasonable application" of federal law as determined by the Supreme Court "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 408, 120 S. Ct. 1495.

In concluding no clearly established federal law on point exists in this case, the Sixth Circuit majority "looks first at the facts of the case, extracts the narrowest possible legal rule to fit that situation, and then, upon predictably finding no Supreme Court precedent on all fours, uncovers no clearly established federal law." *Davis v.*

Straub, 430 F.3d at 294 (Merritt, J., dissenting). As this Court noted in *Williams v. Taylor*, 529 U.S. at 407, many principles may be applicable in new factual settings not precisely alike the facts of the Supreme Court case at issue, and a state court may err by unreasonably refusing to extend the "principle to a new context where it should apply."[18]

2. The Sixth Circuit's Narrow View of the AEDPA Standard Violates Article III and the Suspension Clause.

The Sixth Circuit decision turns the case by case approach for general principles intended for broad application on its head. This extremely narrow approach, limiting clearly established federal law to Supreme Court decisions involving the same facts, would mean that only in the rare case will there be any precedent on point, quite contrary to the approach this Court has adopted. *Wright v. West, supra*, n.19. Petitioner maintains this approach violates Article III of the Constitution, effectively ceding the authority of the federal courts to declare what federal law is. *See Davis v. Straub*, 2006 WL 1042354, (amended order of April 21, 2006, denying rehearing en banc, Martin, J., dissenting); *Davis v. Straub*, *supra*, 430 F.3d at 298 (Merritt, J., dissenting).

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[18] *See also* Justice Kennedy's characterization in *Wright v. West*, *supra*, 505 U.S. at 309:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Petitioner further maintains this narrow approach also effectively suspends the writ of habeas corpus in violation of Article 1, Section 9, of the Constitution, because it makes the writ available in theory only. *Id.*

3. Clearly Established Federal Law Requires Issuance of the Writ.

Two clearly established principles, both intended for broad application on a case by case basis, require the writ to issue.

The right to present a defense is such a rule. This Court framed its holding in *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), more broadly than the facts of the case before it, establishing that a state may not "arbitrarily den[y a defendant] . . . the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." This rule is clearly intended to be applied on a case by case basis.[19]

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[19] The Sixth Amendment right to present a defense is one of broad application in different factual settings, as is clear from a variety of Supreme Court decisions. "The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (internal quotation omitted). The right includes the right to an impartial jury, with the prosecution bearing the burden of proving to the jury guilt beyond a reasonable doubt; the right to compel and call witnesses at trial; and the right to confront and cross examine. Together, these constitutional

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Davis had a right under clearly established federal law to call Jourdan as a defense witness.

Similarly, the principles that a witness has no Fifth Amendment privilege unless there is a real and probable, not imaginary and unsubstantial, danger of self-incrimination, and that the privilege must be invoked in response to questions and not in a blanket fashion, are clearly established. *Brown v. Walker*, 161 U.S. 591, 608, 16 S. Ct. 644, 40 L. Ed. 819 (1896); *Mitchell v. United States*, 526 U.S. 314, 326, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999); *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951); *Rogers v. U.S.*, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951).

Contrary to these cases, the majority held that, because the Supreme Court has not said so in a case with indistinguishable facts, these Fifth and Sixth Amendment principles are virtually inapplicable in habeas cases. However, at the same time the majority conceded that the rule that a witness must exercise the Fifth Amendment in response to questions is universally recognized in the caselaw, citing, *e.g.*, *In re Morganroth*, 718 F.2d 161 (6th Cir. 1983). The majority's narrow interpretation of the AEDPA standard of review is in conflict with Supreme Court precedent.

Jourdan's proposed testimony was unquestionably relevant and material under *Washington*. He would have

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guarantees reflect the "conviction . . . that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined" by the trier of fact. *Washington v. Texas*, *supra*, 388 U.S. at 22.

testified, consistently with his three pretrial statements, that Bell acted alone in murdering Jones and that Bell said he intended to kill the children. His testimony would have corroborated Davis, and strongly tended to exonerate him. Clearly, if exclusion of his testimony was error, it cannot have been harmless under *Brecht v. Abramson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), because it likely would have had a substantial and injurious effect on the verdict.

The premise of the Sixth Circuit majority and state court opinions is that Jourdan had a Fifth Amendment privilege, simply because he was at the scene, and testifying to that alone would have increased the likelihood he would be prosecuted; and further that even if he testified on direct there was a ***possibility*** he might have a basis to assert the privilege on cross examination. Neither opinion identifies anything else as potentially incriminatory, but instead speculate it was possible, particularly on cross examination.

The existence of the Fifth Amendment privilege is "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Hoffman, supra*, 341 S. Ct. 621, 61 L. Ed 1198 (1917). "[W]here there can be no ***further*** incrimination, there is no basis for the assertion of the privilege." *Mitchell v. United States, supra*, 526 U.S. at 326. A witness may not invoke the privilege against self-incrimination where the danger is "imaginary and unsubstantial." *Brown v. Walker*, 161 U.S. at 608.

Blanket assertion of the privilege is inappropriate, because a witness' own say so cannot of itself establish there is a hazard of self-incrimination. *Hoffman, supra*, 341 U.S. at 486. Instead, a witness is required to take the stand and testify and "give a responsive answer to the question or an explanation of why it cannot be answered" without self-incrimination. *Id.* at 487.

Jourdan had no privilege. He had given three statements a year before the trial and before he was called as a witness. He consistently maintained he was at the scene but did nothing to assist Bell. His second statement to police was *Mirandized*, even though he was not in custody, and clearly could have been introduced against him had he ever been charged. There was no question he had been present; that was known from multiple sources outside of his own statements. In these circumstances, if Jourdan testified he was present at the scene, that could not have increased the likelihood of prosecution. The issue here is not that the Sixth Amendment right to compulsory process trumps the witness' privilege against self-incrimination, as the majority mischaracterized the issue. 430 F.3d at 290. The claim is that the right to compulsory process was violated where the witness' privilege against self-incrimination was ***not*** implicated, and yet he was allowed to assert the privilege in blanket fashion.

The state *per curiam* opinion was contrary to the above clearly established law, because the decision failed to identify or apply *Washington v. Texas, supra*, regarding the right to present a defense and call a witness with relevant and material testimony to offer. Nor did the state court opinion identify or apply clearly established Fifth Amendment law that there is no privilege against self-incrimination where there is no "real and probable" increased danger of incrimination if the witness answered the questions.[20]

The conclusion of the state court majority opinion that Jourdan had a reasonable basis to fear self-incrimination on cross examination has no support in the record, due to the erroneous manner in which the trial court dealt with the issue. The trial court allowed Jourdan to assert the privilege in a blanket fashion rather than question by question. The conclusion that even if Jourdan were to testify on direct, he ***might*** have asserted a privilege on cross examination is mere speculation.[21] Such speculation

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[20] Since the state court did mention the constitutional privilege against self-incrimination, it is possible the issue should be reviewed under the "unreasonable application" clause. Petitioner maintains that the decision was an unreasonable application of clearly established Fifth Amendment law, again because Jourdan had no real fear of further incrimination by testifying he was present. The state decision did not discuss that principle nor apply it to the facts, and was therefore not a reasonable application of the established law.

[21] This speculative conclusion erroneously assumes the only remedy when a witness asserts a privilege on cross examination is to strike the whole of the witness' testimony. That is not the law. Numerous federal courts have recognized that striking all of a witness' testimony is a drastic remedy not lightly invoked and only appropriate where a witness' invocation of the privilege frustrates cross examination on material issues.

Instead, where the Sixth Amendment right to compulsory process is involved, a court must balance that constitutional right and the government's non-constitutional interest in cross examination. *See, e.g., United States v. Gary*, 74 F.3d 304, 310 (1st Cir. 1996). *See also Combs v. Kentucky*, 74 S.W.3d 738 (KY 2002) (collecting numerous federal cases in accord). The general rule is that a trial court's authority to completely strike a witness' testimony depends on whether the witness refuses to answer questions on collateral versus non-collateral matters. *See, e.g., Denham v. Deed*, 954 F.2d 1501, 1503-04 (9th Cir. 1992); *United States v. Doddington*, 822 F.2d 818, 822 (8th Cir. 1987); *United States v. De La Cruz*, 996 F.2d 1307 (1st Cir. 1993); *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1280 (1st Cir. 1992). It is error for a

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is no justification for violating Davis' right to present a defense.

Had the Sixth Circuit applied the correct standard under the AEDPA, a writ would have issued, as that Court correctly ruled in its first opinion in this case.

◆

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant a writ of *certiorari*, or in the alternative, hold this case in abeyance pending the decision in *Carey v. Musladin*.

Respectfully submitted,

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Dated: August 10, 2006

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court to strike testimony of defense witness because of refusal to answer a question dealing with collateral issue. *United States v. Lord*, 711 F.2d 887, 892 (9th Cir. 1983).

Because the court excused Jourdan and he did not testify at all, even on a separate record, the trial court did not engage in any balancing analysis.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANTA DAVIS,
Petitioner-Appellant,
v.
DENNIS STRAUB, Warden,
Respondent-Appellee.

No. 03-2262

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 02-73319 – Gerald E. Rosen, District Judge.

Argued: March 17, 2005

Decided and Filed: December 1, 2005

Before: MERRITT and ROGERS, Circuit Judges;
HOOD, Chief District Judge.*

COUNSEL

ARGUED: John R. Minock, CRAMER & MINOCK, Ann Arbor, Michigan, for Appellant. Janet A. Van Cleve, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** John R. Minock, CRAMER & MINOCK, Ann Arbor, Michigan, for Appellant. Janet A. Van Cleve, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

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* The Honorable Joseph M. Hood, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

ROGERS, J., delivered the opinion of the court, in which HOOD, D. J., joined. MERRITT, J. (pp. 10-16), delivered a separate dissenting opinion.

AMENDED OPINION

ROGERS, Circuit Judge. Respondent-Appellee Dennis Straub has petitioned for rehearing following this panel's decision to order the district court to grant Petitioner-Appellant Danta Davis's habeas corpus petition. In this case, a Michigan jury convicted Davis of murdering one woman and two children in 1996, and Davis was sentenced to multiple concurrent life sentences. During his joint trial with co-defendant Nathan Bell, Davis sought to have witness Damaris Jourdan testify as to Jourdan's prior statements, which tended to exculpate Davis, made to police and a private investigator. Before Jourdan took the witness stand, the prosecutor, in front of Jourdan, informed the court that Jourdan was a suspect and should consult with a lawyer before testifying. Jourdan, after consulting with his lawyer, invoked his Fifth Amendment privilege against self-incrimination. The court stated that "whether or not [Jourdan] testifies is a choice that is his alone," and the court allowed him to make a blanket invocation without taking the stand and responding to individual questions. The state appellate court affirmed Davis' conviction, determining that the trial court committed harmless error by allowing the witness to determine the breadth of the privilege against self-incrimination.

After the district court denied his petition for habeas corpus, this court certified three questions for appeal on habeas review: (1) whether the prosecutor intimidated Jourdan into invoking his privilege against self-incrimination in violation of Davis's right to due process, compulsory process, and presentation of his defense; (2) whether Davis was denied a fair trial and his right to present a defense when the trial court sustained Jourdan's blanket assertion of the privilege against self-incrimination; and (3) whether Davis was deprived of effective assistance of counsel when defense counsel, after failing to object to Jourdan's blanket assertion of his Fifth Amendment right not to incriminate himself, failed to offer into evidence Jourdan's prior exculpatory statements. In our earlier opinion, we unanimously held that the prosecutor did not engage in witness intimidation. A majority of the panel also held that Davis was denied a fair trial and the right to present a defense when the court allowed Jourdan to assert a blanket invocation of his right not to incriminate himself. We ruled in the alternative that, if such an invocation of the Fifth Amendment were permissible, Davis received ineffective assistance of counsel when defense counsel did not seek to introduce Jourdan's prior exculpatory statements. After reconsidering our prior decision, we vacate that prior decision and affirm the district court's denial of Davis's petition in all respects because the state courts did not act contrary to or unreasonably apply clearly established federal law, as determined by the Supreme Court.

I.

We repeat in this section the facts of the case as recounted in our earlier opinion:

Sheila Jones and her two children, seven-year-old Darquelle Ray and four-year-old Shawanna Ray, were murdered on September 26, 1996. Jones was killed in the home of Davis's father, Jimmy Motley, while the children were killed in their own home, down the street from Motley's. Motley, the boyfriend of Jones, was in jail at the time of the murders. Davis, Bell, and others were in Motley's home on the evening of September 26, when Motley called to speak with Jones, as he frequently did. Davis went down the street to Jones's home and brought her back to Motley's house, where she was killed later that evening. The children were killed soon thereafter.

Davis and Bell were tried in a joint trial before separate juries. The prosecution's theory of the case was that Davis and Bell cooperated in beating and killing Jones and her children. Davis's theory of the case was that Bell killed Jones and the children by himself and that Davis assisted only in disposing of Jones's body, which Davis admitted doing out of fear of retribution from Bell and his family if he refused. Bell confessed to the murders, but also attempted to incriminate Davis, while Davis maintains his innocence. Most of the witnesses implicating Davis were related to or affiliated with Bell. The record reflects no physical evidence linking Davis to the murders. In Davis's testimony at the trial, he claimed the only person (other than himself and Bell) in the house when Jones was being beaten was then fifteen-year-old Damaris Jourdan.[1]

Jourdan's pre-trial statements strongly tend to exonerate Davis of the murder. He made two statements to police approximately one week after the murders, on

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[1] This name is sometimes spelled "Jordan" in the record.

October 2, 1996, and October 3, 1996. Both Jourdan's mother and father were present for the first statement, which was not Mirandized. In that statement, Jourdan reported witnessing Bell, and Bell alone, beating, "stomping," and grabbing Jones by the neck, both inside the house and in the front yard and finally dragging her from the yard into the garage. Jourdan then reported leaving the area.

The day after his first statement, the police brought Jourdan and his mother back to the station for another interview. This time, the police read him his rights "per the Miranda Warning Card, which he stated he waived." His mother was also informed of his rights. The police then informed Jourdan that another suspect had implicated him in the crime. After waiving his right to remain silent and to have an attorney present, Jourdan denied any involvement in the murders. He reiterated his statement from the previous day and elaborated somewhat, stating that, just before leaving, he heard Jones breathing in the garage and saw Bell standing nearby holding a black and yellow handled screwdriver. Jourdan reportedly said to Bell, "Leave her alone," to which Bell responded, "She saw my face."

Approximately ten months later, Jourdan gave a statement to a private investigator hired by Davis's defense counsel. This statement, while more detailed, is very consistent with the earlier ones given to police.[2] In addition to the details recited earlier, Jourdan reported that Bell told him that he planned on killing Jones's children (who were still in their home down the street) because they knew where their mother had gone. Bell reportedly attempted to get Jourdan's help in killing the children. Jourdan reported that he refused to help and walked off alone before Jones was killed. He repeatedly told the investigator that neither he nor Davis had hit or stabbed Jones at any time and that Davis was not even outside to witness the violence. His eyewitness account is consistent with Davis's testimony at trial. Jourdan's account exonerates himself and strongly tends to exonerate Davis of murder.

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[2] The record of Jourdan's statement to the private investigator is in question-and-answer format, similar to a trial transcript, while the statements to the police are summaries, apparently written by an officer present at the interviews.

Apparently unaware that either the prosecutor or the trial judge would prompt Jourdan to assert his Fifth Amendment privilege, Davis's defense counsel, Phillip Beauvais, identified Jourdan by name in his opening statement and told the jury to expect to hear him recount the version of events described above. During the trial, after Jourdan was called by the defense and sworn in as a witness, Prosecutor Arthur Busch requested a sidebar. The judge excused the jury and discussed the prosecutor's concerns on the record. Busch informed the court, within earshot of Jourdan, that Jourdan was a suspect in the case and should be informed of his Fifth Amendment rights before he testified. After questioning Jourdan briefly, the judge obtained counsel for him, who spoke with Jourdan and his parents and reviewed relevant documents. On advice of counsel appointed by the judge, Jourdan invoked his Fifth Amendment privilege against self-incrimination and refused to testify. The trial court did not follow the normal procedure of putting the witness on the stand and allowing him to invoke the privilege as to individual questions. Instead, the court allowed Jourdan not to testify or answer any questions at all, stating "whether or not he testifies is a choice that is his alone under these circumstances." This sparked a heated exchange between Davis's defense counsel and the prosecutor:

> BEAUVAIS: I think what is happening today is that this young man is afraid that if he takes the stand and testifies truthfully and that truthful testimony will help Danta Davis that, in fact, the Prosecutor will then, as retribution for him testifying, will then charge him with a crime. I believe the only reason that this was brought forward at this particular time was to keep this young man from testifying. And I believe that because of that my client is being denied his right to a fair trial and is denied his right to have his witnesses appear, witnesses that can certainly exonerate this person.
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> . . . .
>
> BUSCH: This is not an intimidating thing, that is to try and protect the People's right, as well as Mr. Jourdan's right Quite frankly, if we had our druthers, we would prefer him to testify in this matter because we think it would bring out the truth. But there is no – there is no merit to any allegation that our office somehow is involved in some intimidation of Mr. Jourdan. We have made it clear throughout, since this trial started, to defense counsel that at some point if [Jourdan] was to be summoned that he would need to have counsel and that there should be some discussion of that with this particular individual.

The trial continued without Jourdan's testimony, and both Davis and Bell were convicted and received multiple life sentences. No charges have been brought against Jourdan for the murders.

Davis made a motion for a new trial based, in part, on his objections to the handling of Jourdan's testimony by the prosecutor and trial judge. This resulted in an evidentiary hearing where both defense counsel Beauvais and prosecutor Busch testified regarding their discussions and actions about Jourdan leading up to the trial.

It is undisputed that the prosecutor never charged Jourdan with any participation in the crime. Busch testified that police had notified him that some evidence existed implicating Jourdan in the crime, primarily the testimony of Bell that Jourdan had also stabbed Jones. At the time of Davis's trial, however, Busch did not believe the case was strong enough to pursue charges against Jourdan, although he did allegedly make some additional efforts to develop the evidence after Davis's trial concluded. Busch testified that prior to Jourdan's appearance in court, he had several conversations with Beauvais, at least once in chambers with the trial judge, wherein he raised his Fifth Amendment concerns and notified Beauvais of the need for Jourdan to have separate representation. Before issuing his order regarding the motion for a new trial, the judge reported that he remembered discussions in chambers about Jourdan before he was called, but he could not remember the precise issues raised.

Beauvais repudiated Busch's account and claimed that the only conversations that they had regarding Jourdan pertained to possible hearsay objections to his testimony. Furthermore, Beauvais testified that he would not have mentioned Jourdan by name in his opening statement, nor would he have called him to the stand in front of the jury, if the prosecutor or the court had made him aware of potential Fifth Amendment concerns. Jourdan's name appeared on both the defense and the prosecution's witness lists, which were exchanged long before trial. Beauvais, therefore, gave notice to the prosecutor of Jourdan's upcoming appearance and provided ample time for him to notify defense counsel of his concerns prior to opening statements.

The court denied Davis's motion for a new trial finding that defense counsel "knew or should have known – with emphasis on the should have known – that Mr. Jordan [sic] required some treatment outside the presence of the jury before he was called to the stand." It rejected his claim that the prosecutor had acted improperly or in an intimidating fashion by alerting the court of his constitutional concerns.

Davis then appealed to the Michigan Court of Appeals, which held that the trial judge had misstated the law in determining that the witness, not the court, could decide for himself if the privilege applied. Nevertheless, the Court of Appeals affirmed the lower court's decision because "the trial court also found that there was a reasonable basis for Jordan [sic] to fear self-incrimination. . . ." *People v. Davis,* No. 207725, 2000 WL 33385391, at *3 (Mich. Ct. App. Dec. 26, 2000) (per curiam).

Davis properly and timely exhausted his claims in state court and then filed this petition for a writ of habeas corpus in federal district court. A magistrate judge issued a report and recommendation denying his petition, which was adopted by the district court. In the report, the Magistrate Judge determined that Jourdan's blanket assertion of the privilege did not provide grounds to grant the writ because "[e]ven his admission that he was present during the murder, although undisputed and not sufficient in itself to convict him of any crime, would be one link in the chain of evidence establishing his guilt." Davis appeals the judgment of the district court.

II.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), permits federal courts to grant petitions for habeas corpus only when a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . . " The Supreme Court has said that a decision is contrary to clearly established precedent "if the state court applies a rule that contradicts the governing law set forth in our cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). Holdings of the Supreme Court, not dicta, clearly establish federal law. *Id.* at 412. Ultimately, "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." *Mitchell v. Esparza,* 540 U.S. 12, 17 (2003).

This court reviews the legal conclusions of the district court de novo and its factual findings for clear error. *See Lott v. Coyle,* 261 F.3d 594, 606 (6th Cir. 2001). We review de novo the mixed factual and legal issue of whether Davis received ineffective assistance of counsel. *See id.* After reconsidering our earlier decision, we hold that the state courts did not act contrary to or unreasonably apply precedent of the Supreme Court.

III.

We reaffirm our earlier holding that the prosecutor in this case did not engage in any unconstitutional intimidation of Jourdan by ensuring that Jourdan was aware of his right not to incriminate himself. In *Webb v. Texas,* 409 U.S. 95, 98 (1972), the Supreme Court established a standard for finding a constitutional violation for witness intimidation: "the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." The following year, we applied *Webb* to a case where the prosecutor sent a Secret Service agent to communicate ex parte with a potential witness and threaten prosecution if he testified. "[T]he Government's action here substantially interfered with any free and unhampered determination the witness might have made as to whether to testify and if so as to the content of such testimony." *United States v. Thomas,* 488 F.2d 334, 336 (6th Cir. 1973). The prosecutor's conduct in the instant case simply does not rise to the level of intimidation present in *Webb* and *Thomas.* Here, the prosecutor requested a sidebar with the judge, wherein he informed the court that the witness was a suspect and should be informed of his constitutional rights. The judge then proceeded to question the witness briefly and appointed independent counsel to advise him of his rights. Neither the prosecutor's nor the judge's conduct was unconstitutional, especially considering the ethical obligation, imposed on prosecutors by the ABA's model guidelines, to

> advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a prosecutor to so advise a witness whenever the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution.

ABA Standards for the Administration of Criminal Justice § 3-3.2(b).

Regardless of the prosecutor's motives or the propriety of waiting until the witness was called to the stand to inform the court of his concerns, we cannot say that the Michigan Court of Appeals unreasonably applied Supreme Court precedent in its holding that the prosecutor did not intimidate Jourdan into invoking the privilege.

IV.

Because the Supreme Court has never held that permitting a witness to assert his or her Fifth Amendment privilege against self-incrimination without taking the witness stand violates a defendant's right to a fair trial, the trial court did not act contrary to clearly established federal law when it allowed Jourdan to invoke the privilege before taking the witness stand. To support his claim that the state courts' handling of Jourdan's Fifth Amendment privilege against self-incrimination was contrary to clearly established federal law, Davis refers us to two Supreme Court cases: *Hoffman v. United States,* 341 U.S. 479 (1951), and *Washington v. Texas,* 388 U.S. 14 (1967).[3]

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[3] Davis also refers us to several circuit court cases, including cases from this circuit. However, AEDPA permits us to consider only federal

(Continued on following page)

Davis argues that *Hoffman* clearly established that witnesses must invoke their Fifth Amendment privilege in response to each posed question and that *Washington* required the trial court to compel Jourdan to testify because, otherwise, Davis would have been arbitrarily deprived of his right to a fair trial. Our review of these cases, however, convinces us that *Hoffman* and *Washington* did not clearly establish how to resolve the conflict between a witness's Fifth Amendment privilege and a defendant's right to present his defense. Because these cases do not resolve the issue, the state courts necessarily could not have acted contrary to clearly established Supreme Court precedent.

The witness Jourdan invoked his Fifth Amendment right not to testify, after consulting with independent counsel, without unconstitutional intimidation by the prosecution. The trial court did not require Jourdan to take the stand and invoke his right in response to each question. The only way to hold that this procedure was "contrary to" established Supreme Court law is to determine that Supreme Court case law requires defense witnesses invoking the Fifth Amendment right against self-incrimination to take the stand and invoke the right on a question-by-question basis.

Such a rule doubtless has merit, *see In re Morganroth,* 718 F.2d 161, 167 (6th Cir. 1983), although it could be argued that the trial court should have discretion to permit blanket invocation of the right in appropriate

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law, "as determined by the Supreme Court of the United States. . . . " 28 U.S.C. § 2254(d)(1).

circumstances.[4] But the petitioner has referred to no Supreme Court case holding that such a procedure is required for the benefit of criminal defendants.

Hoffman v. United States, 341 U.S. 479, 486-87 (1951), did not hold that a witness's privilege against self-incrimination must yield in favor of the defendant's right to put on his defense, because the Court did not consider a witness's invocation of the privilege. In *Hoffman,* the defendant, not his witness, claimed the privilege during a grand jury hearing. The Court, accordingly, did not consider the relationship between the witness's privilege against self-incrimination and the defendant's right to put on his defense.

Hoffman, moreover, announced no rule proscribing the blanket assertion of the privilege against self-incrimination. In fact, the Court *upheld* the defendant's invocation of the privilege as to very preliminary questions. The opinion in *Hoffman* does state at one point, "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." 341 U.S. at 486-87. This single sentence by its terms, and certainly in context, does not necessarily imply – and clearly does not hold – that defense witnesses must always take the stand to invoke the privilege. *See Arredondo v. Ortiz,* 365 F.3d 778, 782 (9th Cir. 2004) (holding, in a case extremely similar to the one at bar, that *Hoffman* does not mandate question-by-question invocation of the privilege). In context, the Court may have been simply admonishing trial courts to use their good judgment when determining whether a responsive answer would tend to incriminate the witness. *Hoffman,* 341 U.S. at 486. Indeed, the Court immediately followed by saying: "The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" *Id.* at 487 (citing *Exparte Irvine,* 74 F. 954, 960 (C.C.S.D. Ohio 1896) (Taft, J.)).[5]

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[4] Defendant suggests that the first question for Jourdan would have been: "Were you present?" A strong case can be made that such an initial question could properly warrant invocation of the privilege. *See Hoffman v. United States,* 341 U.S. 479 (1951). If so, it is arguably a pointless formality, within a trial court's discretion to forgo, to insist that the witness take the stand.

It is true that our circuit in *Morganroth, supra,* stated as follows:

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[5] To bolster his reading of *Hoffman,* Davis argues that *Mitchell v. United States* compels a question-by-question invocation because the Court stated "that where there can be no further incrimination, there is no basis for the assertion of the privilege." 526 U.S. 314, 326 (1999). But this dictum in *Mitchell* does not assist Davis. *See Williams v. Taylor,* 529 U.S. 362, 412 (2000) (stating that "clearly established" refers to holdings, not dicta). First, the *Mitchell* Court considered two issues not before us in this case: whether a defendant's guilty plea waives his privilege against self-incrimination in the sentencing phase of a trial, and whether a sentencing judge can draw an adverse inference from the defendant's silence. The Court did not consider the Fifth Amendment right of a witness in relation to the defendant's right to present his defense. Second, the Court's dictum does not call into question the trial court's determination that Jourdan was in danger of further incrimination on cross-examination. In fact, the Court stated that the defendant "may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details [upon cross-examination]." *Id.* at 321. *Mitchell* not only dealt with different issues but also supports the trial court's inquiry into whether Jourdan could further incriminate himself. *Mitchell,* therefore, does not support Davis' argument that *Hoffman* clearly established that Davis was entitled to have Jourdan take the witness stand.

> A blanket assertion of the privilege by a witness is not sufficient to meet the reasonable cause requirement and the privilege cannot be claimed in advance of the questions. The privilege must be asserted by a witness with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify. *See Hoffman,* 341 U.S. at 486-88.

718 F.2d at 167. The issue resolved in *Morganroth,* however, was not whether the invocation of the privilege required that the witness take the stand. The witness in that case had in fact taken the stand. Instead, the issue was whether the witness "must supply personal statements . . . or . . . evidence with respect to each question propounded to him to indicate the nature of the criminal charge which provides the basis for his fear of prosecution" in the particular context of possible incrimination for perjury. *Id.* at 169. Such a requirement was warranted where the witness feared incriminating himself of perjury by giving testimony inconsistent with prior sworn testimony, because "the incriminating nature of the answer is not evident from the implications of the question in the setting in which it is asked. . . . " *Id.*

Not only is this a different issue, but also the issue was raised in the context of an appeal by a witness from an order directing him to testify, not in the context of a criminal defendant's right to present testimony. The statement in *Morganroth* about blanket assertions and particular questions is thus at best dictum with respect to the issue presented in this case: whether a criminal defendant has a due process right to prevent witnesses from invoking the Fifth Amendment without taking the stand and responding to individual questions, regardless of the circumstances. In any event, AEDPA calls for us to interpret clearly established federal law, "as determined by the Supreme Court of the United States," not the United States Courts of Appeals. Indeed, the Supreme Court has considered that a state court may disagree with the law of its federal circuit: "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." *Mitchell v. Esparza,* 540 U.S. 12, 17 (2003).

The Supreme Court's decision in *Washington v. Texas,* 388 U.S. 14 (1967), also fails to warrant a grant of habeas corpus under AEDPA. It is true that, entirely outside the Fifth Amendment self-incrimination context, *Washington v. Texas* clearly established that, under the Sixth Amendment, a state may not arbitrarily deny a defendant the right to call a witness whose testimony is relevant and material to the defense. *Washington,* 388 U.S. at 23. But the Michigan Court of Appeals' decision was neither contrary to nor an unreasonable application of *Washington v. Texas.*

Washington v. Texas does not hold that a defendant has the right to present any and all witnesses. The Court addressed the limits of a defendant's right to call witnesses and held that a state cannot create "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief." *Id.* at 22. The Court proceeded to hold that Texas' rule against allowing purported accomplice testimony was an "absurdity." *Id.* Because the Court did not consider the question of a witness's Fifth Amendment privilege against self-incrimination anywhere in its opinion, it cannot be said that the Court created clearly established law against a blanket assertion of the privilege or resolved how courts should treat the tension between the witness's and the defendant's interests. *See id.* at 23 n.21 ("Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination . . . , which [is] based on entirely different considerations from those underlying the common-law disqualifications for interest.").

V.

The remaining basis for granting the writ – that Davis received ineffective assistance of counsel when defense counsel did not try to introduce Jourdan's prior unsworn statements into evidence – fails because Davis was not prejudiced by his counsel's failure to seek the admission of Jourdan's prior statements. Constitutionally ineffective assistance of counsel requires both that defense counsel's services fell below that of a reasonably competent attorney and that the deficiency prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). To establish prejudice, Davis must demonstrate that Jourdan's prior unsworn statements were admissible. But the contrary was held by the Michigan Court of Appeals, which determined as a matter of state evidence law that Jourdan's prior statements would not have been admissible in any event. *See People v. Davis,* No. 207725, 2000 WL 33385391, at *3 (Mich. Ct. App. Dec. 26, 2000) (per curiam) ("[The statements] do not qualify as statements against his penal interest for purposes of MRE 804(b)(3)."). We are bound by the state court's determination of its own law. *Hutchison v. Marshall,* 744 F.2d 44, 46 (6th Cir. 1984); *see also Vroman v. Brigano,* 346 F.3d 598, 603 (6th Cir. 2003); *Israfil v. Russell,* 276 F.3d 768, 771 (6th Cir. 2001); *Duffel v. Dutton,* 785 F.2d 131, 133 (6th Cir. 1986). Because we cannot logically grant the writ based on ineffective assistance of counsel without determining that the state court erred in its interpretation of its own law, we are constrained to uphold the district court's denial of the writ.

Finally, a different result is not required by the asserted tension between a constitutional holding that a witness may not be required to testify for fear of providing an incriminating statement and a state-law evidentiary holding that prior statements by the same witness were not admissible as statements against penal interest. Davis does not refer us to any authority for the proposition that these determinations are legal mirror-images of each other, and certainly the Supreme Court has not so held as a matter of constitutional law. The state courts, therefore, did not act contrary to or unreasonably apply federal law when determining that Davis received effective assistance of counsel.

VI.

Upon reconsideration, we VACATE our prior ord[illegible] and AFFIRM the judgment of the district court.

DISSENT

MERRITT, Circuit Judge, dissenting. The majority's decision achieves the unfortunate trifecta of misapplying the Supreme Court's jurisprudence under 28 U.S.C. § 2254(d)(1), gutting the Article III judicial power while "suspending" the writ of habeas corpus, and stranding a probably innocent inmate in prison for life. This Court does so by construing § 2254(d)(1) and its "clearly established law" requirement to preclude federal habeas relief except where Supreme Court precedent with indistinguishable facts counsels otherwise. There seems little doubt that prior to the enactment of § 2254(d)(1) of AEDPA, and my colleagues' interpretation of it, the writ of habeas corpus would have issued in this case to require a new trial in which Davis would be allowed to put before the jury Jourdan's exculpatory testimony.

I. The Requirements of 28 U.S.C. § 2254(d)(1)

Notwithstanding the majority's contention to the contrary, the Supreme Court had set forth "clearly established law" both under the Sixth Amendment Compulsory Clause and the Fifth Amendment's self-incrimination privilege prior to the Michigan Court of Appeals' decision, from which the Michigan Supreme Court denied leave to appeal. The Michigan Court's brief *per curiam* opinion was contrary to that clearly established law because it failed to mention or apply the relevant governing legal principles under the Fifth and Sixth Amendments. Thus, our Court should have issued the writ in this case to correct the conviction's constitutional infirmity.

A. "Clearly Established Law"

28 U.S.C. § 2254(d)(1) empowers an Article III court to grant the writ of habeas corpus where a state court judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Supreme Court has defined "clearly established law" as the holdings, not dicta, of its decisions. *Williams v. Taylor,*

529 U.S. 362, 412 (2000). The term "holding" for purposes of § 2254(d)(1) is not limited to bright-line rules and narrow statements like "judgment for defendant" but instead refers to "the governing legal principle or principles set forth by the Supreme Court." *See Lockyer v. Andrade,* 538 U.S. 63, 71 (2003).

The Supreme Court has adopted the spectrum of abstraction of *Teague v. Lane,* 489 U.S. 288 (1989), to determine whether a particular legal principle was clearly established at the relevant time. *See Williams,* 529 U.S. at 412 (With the caveat that the source of clearly established law is Supreme Court jurisprudence, "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1)."). At one end of the spectrum lie legal principles with such a high level of generality, like the Eight [sic] Amendment principle of reliability in sentencing, whose application does not necessarily lead to a "predictable development" in the relevant law and therefore can not be considered clearly established. *See Sawyer v. Smith,* 497 U.S. 227, 236 (1990). On the other end are narrowly drawn bright-line rules with little application beyond factually indistinguishable situations. In the middle of the spectrum lie those general principles of law crafted by the Supreme Court to constitute clearly established law in a wide range of factual situations. It was the middle of the spectrum that Justice Kennedy described while concurring in *Wright v. West,* 505 U.S. 277, 308-09 (1992):

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications

> themselves create a new rule . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

A majority of the Supreme Court has adopted Justice Kennedy's "case-by-case" view. *See Williams,* 529 U.S. at 391 ("That the *Strickland* test 'of necessity requires a case-by-case examination of the evidence' obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court.") (internal citation omitted); *Rompilla v. Beard,* ___ U.S. ___, 125 S. Ct. 2456, 2471 (2005) (O'Connor, J., concurring) (noting the " 'case-by-case examination of the evidence' called for under our cases"); *Williams,* 529 U.S. at 382 (Stevens, J., dissenting in part) ("In the context of this case, we also note that, as our precedent interpreting *Teague* has demonstrated, rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule."); *Graham v. Collins,* 506 U.S. 461, 506 (1993) (Souter, J., dissenting) ("One general rule that has emerged under *Teague* is that application of existing precedent in a new factual setting will not amount to announcing a new rule.").

Broad rules whose application to new factual situations have constituted clearly established law include *Strickland*'s ineffective assistance of counsel standard, *see Williams,* 529 U.S. at 391; *Rompilla,* 125 S. Ct. at 2460, and *Jackson v. Virginia*'s sufficiency of the evidence standard, *see Wright,* 505 U.S. at 308-09 (Kennedy, J., concurring). The Courts of Appeals have followed suit by finding clearly established law even where Supreme Court case law does not rest "on all fours." *Lewis v. Johnson,* 359 F.3d 646, 655 (3d Cir. 2004); *Hart v. Attorney Gen. of the State of Florida,* 323 F.3d 884, 893 n.16 (11th Cir. 2003); *Burdine v. Johnson,* 262 F.3d 336, 354 (5th Cir. 2001); *Torres v. Prunty,* 223 F.3d 1103, 1110 (9th Cir. 2000).

In the instant case, my colleagues have identified, but incorrectly applied, the overriding legal principle applicable to this case in part V of their opinion:

> *Washington v. Texas* clearly established that, under the Sixth Amendment, a state may not arbitrarily deny a defendant the right to call a witness whose testimony is relevant and material to the defense. *Washington,* 388 U.S. at 19.

This principle of general application has been clearly established since 1967, decades before the state judgment at issue here. This principle interprets the Sixth Amendment's Compulsory Process Clause (the right of "the accused . . . to have compulsory process for obtaining witnesses in his favor"), which, as described by Blackstone, catechized in the Bill of Rights this well-established and fundamental right of English law. *See* Peter Westen, *The Compulsory Process Clause,* 73 Mich. L. Rev. 71, 90-101 (1974). The *Washington v. Texas* principle, though perhaps narrower than *Strickland,* fits comfortably within the middle of *Teague's* spectrum of abstraction in that the principle both provides sufficient content for predictable legal development and applies to a varied range of factual situations. Moreover, the principle clearly applies here because the testimony of the witness Jourdan is "relevant and material," and if believed by the jury – which seems likely to me – would have entirely exonerated Davis of the murder for which he is now imprisoned for life.

A second clearly established legal principle applicable to this case is that a witness like Jourdan may not invoke the self-incrimination privilege unless the danger is "real and probable," not "imaginary and unsubstantial," *Brown v. Walker,* 161 U.S. 591, 608 (1896); *see also Ohio v. Reiner,* 532 U.S. 17, 21 (2001) (describing the Supreme Court's pre-2000 Fifth Amendment precedent). And "where there can be no further incrimination, there is no basis for the assertion of the privilege," *Mitchell v. United States,* 526 U.S. 314, 326 (1999). A witness cannot establish that the danger is "real and probable" by a blanket assertion because "[t]he witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself – his say-so does not of itself establish the hazard of incrimination." *Hoffman v. United States,* 341 U.S. 479, 486 (1951). Rather, the witness should take the stand and give "a responsive answer to the question or an explanation of why it cannot be answered" without self-incrimination. *Id.* at 487.

Once again, these Fifth Amendment principles fall well within the Supreme Court's "case-by-case" approach to its clearly established law jurisprudence and are clearly applicable to the instant case. Jourdan had given three statements before he was called as a witness. He gave two of his statements to the police, each of which was given almost a year before trial, and one to a private investigator. It was clear from his statements that he had nothing to do with the murder and neither did Davis whose behavior Jourdan observed. Jourdan was not threatened with prosecution, and, even if he were to be criminally prosecuted for these murders, his post-*Miranda* statement to the police, which included an admission that he was present during the beating of Jones, would clearly be admissible against him, just as properly *Mirandized* confessions are admissible in subsequent prosecutions against the defendants who made them. *See Miranda v. Arizona,* 384 U.S. 436, 476-77 (1966). As the Supreme Court foresaw in *Walker* and *Mitchell,* there reaches a point where a piece of evidence – in this case Jourdan's presence at the scene of the crime – which all parties agree is only incriminating in the most minimal and remote way, is so overwhelmingly and definitively established that it cannot be constitutionally used to stonewall introduction of other evidence that is highly exculpatory of a criminal defendant. The Fifth Amendment may not be so prompted and used as a shield for the flaw in the state's case, used in such a mechanistic way that it subsumes a criminal defendant's Sixth Amendment right to present a defense.

The majority cites the following quotation from *Washington v. Texas* for the proposition that its legal principle is inapplicable to this case: "Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination . . . , which [is] based on entirely different considerations from those underlying the common-law disqualifications for interest." *Washington v. Texas,* 388 U.S. 14, 23 n.21 (1967). A holding that a witness should be compelled to testify where there is no real and probable danger of incrimination and where there can be no further incrimination does not "disapprove" the privilege against self-incrimination. I do not argue that the Sixth Amendment's Compulsory Clause trumps the Fifth Amendment's self-incrimination privilege, but only that where the two meet and the self-incrimination privilege is hardly, if at all, implicated, the accused should be able to compel exculpatory testimony.

In direct contrast to the Supreme Court's "case-by-case" interpretation of clearly established law, the majority's narrow approach in the instant case finds no clearly established law "[b]ecause the Supreme Court has never held that permitting a witness to assert his or her Fifth Amendment privilege against self-incrimination without taking the witness stand violates a defendant's right to a fair trial. . . . " This approach apparently looks first at the facts of the case, extracts the narrowest possible legal rule to fit that situation, and then, upon predictably finding no Supreme Court precedent resting on all fours, uncovers no clearly established law. This novel jurisprudence marks an abrupt departure from traditional notions of *stare decisis* and violates the dictates of *Teague* and its progeny.

B. "Contrary to" and "Unreasonable Application"

The Michigan Court of Appeals' brief *per curiam* opinion was contrary to the above-discussed clearly established law. A state court decision is contrary to clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An example of the former situation occurs where a court applies the preponderance of the evidence standard when Supreme Court precedent dictates application of the reasonable probability standard. *Id.* at 406.

The state court's decision in the instant case neither identified nor applied the governing legal principle of

Washington v. Texas that a state may not arbitrarily deny a defendant the right to call a witness whose testimony is relevant and material to the defense. With such an oversight, it is not difficult to conclude that the state court's determination that "the trial court did not err in refusing to compel Jordan to testify" was contrary to the clearly established mandate *of Washington v. Texas.*

Neither did the state court's decision identify or apply the Fifth Amendment principles that a witness may not invoke the self-incrimination privilege where there is not a "real and probable" danger of incrimination or "where there can be no further incrimination." Although the state court did discuss the self-incrimination privilege with respect to Jourdan, it observed that "the trial court also found that there was a reasonable basis for Jourdan to fear self-incrimination" without any analysis of the above-discussed clearly established Fifth Amendment principles relevant to this case. Because, as discussed above, Jourdan's fear of self-incrimination was not "real and probable" and there was no danger of "further incrimination" due to his three previous statements, the state court's decision was contrary to clearly established Supreme Court precedent.

The state court's discussion of the relevance of the self-incrimination privilege to Jourdan, however, raises the possibility that this Court should review the Fifth Amendment issue under the "unreasonable application" prong of § 2254(d)(1). A state court unreasonably applies clearly established Supreme Court precedent "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams,* 529 U.S. at 407. To the extent that the state court could be deemed to have identified the correct legal principle by merely discussing the self-incrimination privilege, the state court's decision unreasonably applied the above-discussed Fifth Amendment principles because, as demonstrated above, Jourdan's fear of self-incrimination was simply not "real and probable" and there was no danger of "further incrimination." Likewise, the state court did not extend these relevant and clearly established Fifth Amendment principles to the facts of this case and, therefore, engaged in an unreasonable application of clearly established Supreme Court precedent.

A final observation on the reasonableness of the state court's decision is warranted in light of the Supreme Court's statement that "[t]he more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado,* 541 U.S. 652, 124 S. Ct. 2140, 2149 (2004). The legal principles involved here, although principles of general application, lie much closer to the middle than the end of *Teague*'s spectrum of abstraction where broad principles offer little guidance to applying courts. The principles of general application relevant in this case appropriately cabin state court discretion and provide little leeway for the state court's manifestly erroneous refusal to compel Jourdan to testify.

II. Constitutional Concerns

It seems to me that the Court's reading of AEDPA both unconstitutionally refuses to exercise the "judicial power" required under Article III in a case "arising under this constitution" and "suspends" the writ of habeas corpus in violation of Article I, Section 9. The result – life imprisonment for a probably innocent accused – so undermines both the "the judicial power" and the great writ that it leaves the federal courts without the authority to correct constitutional errors that lead to serious injustice.

A. The "Judicial Power" to Interpret the Constitution

The majority's narrow view of § 2254(d)(1) unconstitutionally obstructs Article III's mandate to exercise the judicial power in cases over which the court properly has jurisdiction. The notion that AEDPA's § 2254(d)(1) raises grave constitutional concerns by impinging on the judicial power and "suspending" the writ of habeas corpus is far from new. *See, e.g., Irons v. Carey,* 408 F.3d 1165 (9th Cir. 2005) (ordering parties to file briefs on the constitutionality of § 2254(d)(1)); *Lindh v. Murphy,* 96 F.3d 856, 885 (7th Cir. 1996), *rev'd* 521 U.S. 320 (1997) (Ripple, J., dissenting) (concluding that § 2254(d)(1) violates Article III); Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* §§ 32.4, 7.2(d) (4th ed. 2001) (discussing constitutionality of § 2254(d)(1)); Brief of Amicus Curiae Marvin E. Frankel et al., *Williams v. Taylor,* 529 U.S. 362 (2000) (No. 98-8384) (brief of five former Article III judges arguing that § 2254(d)(1) violates Article III); Brief of Amicus Curiae ABA, *Williams v. Taylor,* 529 U.S. 362 (2000) (No. 98-8384) (arguing that a court of appeals' interpretation of § 2254(d)(1) violates Article III). The majority's approach exacerbates these concerns and recasts the judicial power as only a faint shadow of Chief Justice Marshall's vision that "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison,* 5 U.S. 137, 177 (1803).

The following provisions of the Constitution describe the judicial power:

> Article III, Section 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . Section 2. *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution* . . . – to all Cases affecting Ambassadors, other public Ministers and Consuls. . . . In all Cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."
>
> Article VI. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Emphasis added.)

The *Federalist Papers No. 78* by Hamilton explains the "judicial power" in the following way:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each

> other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society. . . .
>
> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority. . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. . . .
>
> It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law.

In interpreting the judicial power, the Supreme Court has jealously guarded against undue encroachment, especially from Congress and state courts. Once providing jurisdiction, Congress may not "prescribe rules of decision" that prohibit an Article III court from giving "the effect to evidence which, in its own judgment, such evidence should have" or that leave "the court no adjudicatory function to perform." *United States v. Klein,* 80 U.S. 128, 146-47 (1871); *United States v. Sioux Nation of Indians,* 448 U.S.

371, 392 (1980); *see also Yakus v. United States,* 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting). This Court has jurisdiction under 28 U.S.C. § 2254(a) to decide the constitutional issues in this case. Congress may not say to the federal courts "clearly established law" means a case in the Supreme Court directly in point on the facts, just exactly like the case you have before you. It may, however, say, as the Supreme Court has already said in *Teague v. Lane,* 489 U.S. 288 (1989), and its progeny, you should follow constitutional language and the principles and standards established by the Supreme Court and in existence at the time the state court completed its case. In the present case, my colleagues have said rather, there is no case in the Supreme Court just like the present case – no case directly in point on the facts – and hence the habeas petition must be dismissed. They say that Supreme Court precedent must be defined in its narrowest sense. Such a reading of § 2254(d)(1) renders it unconstitutional by preventing our Court from giving our independent judgment on the legal effect of the evidence before us and by leaving us "no adjudicatory function to perform."

Likewise, Congress cannot require Article III courts to defer to state courts' reading of federal law by preventing the federal judiciary from independently interpreting and applying federal law. *See Cooper v. Aaron,* 358 U.S. 1, 18 (1958) (describing "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" as "a permanent and indispensable feature of our constitutional system"). Justice Stevens has cautioned against interpretations of § 2254(d)(1) that provide undue deference to state court judgments:

> At the core of [the judicial] power is the federal courts' independent responsibility – independent

> from its coequal branches in the Federal Government, and independent from the separate authority of the several States – to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.

Williams, 529 U.S. at 378-79 (Stevens, J., dissenting in part). Using § 2254(d)(1) as a crutch, the majority simply defers to the state court's decision in which the state court neither identifies nor applies the relevant governing legal principles under either the Compulsory Process Clause or the Self-Incrimination Clause. The majority defers by concluding that there is no Supreme Court case with indistinguishable facts. As explained above, this is not the correct interpretation of § 2254(d)(1). Such an interpretation would withdraw from the federal courts, including the Supreme Court, the judicial power to interpret independently the Constitution in most cases and would make the state court's decision the rule we must follow. Such an application of the federal judicial power established in Article III would render § 2254(d)(1) unconstitutional, as Justice Stevens suggests and *Klein* holds.

B. Suspension of the Writ

In the *Federalist Papers No. 84* by Hamilton, we find the following statement of the Founders' original intent: "The most considerable of the remaining objections [to the 1787 Constitution] is that the plan of the convention contains no bill of rights." Hamilton then gives an answer to these objections. He says that the structure of the government itself providing only for enumerated powers and for checks and balances is one of the answers to these objections. Beyond that, he answers the objections as follows:

> Independent of those [answers] which relate to the structure of the government, we find the following:. . . . Section 9 [Article I] clause 2 – "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. . . . " [T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instrument of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: . . . "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and, therefore *a more dangerous engine* of arbitrary government." And as a remedy for this fatal evil he [Blackstone] is everywhere peculiarly emphatical in his encomiums on the *habeas-corpus* act, which in one place he calls "the Bulwark of the British Constitution."

The writ of habeas corpus is the only writ named in the Constitution. So great was its importance for the preservation of liberty that the members of the Constitutional Convention equated it, along with the structural provisions, with a Bill of Rights. Had not some state ratification conventions insisted on a Bill of Rights, the federal courts would have had to create an unwritten Bill of Rights using the writ of habeas corpus and the doctrine that the elected branches are limited to the enumerate powers named in the Constitution. Because of the importance of the clause forbidding the suspension of the writ, the Supreme Court has refused to allow Congress, the executive or the lower courts seriously to reduce its coverage and protections. For example, in *INS v. St. Cyr,* 533 U.S. 289, 300 (2001), the Supreme Court refused to adhere to an interpretation of an immigration statute and AEDPA that "would give rise to substantial constitutional questions" under the Suspension Clause.[1]

A reading of AEDPA § 2254(d)(1) that so broadly circumscribes the writ of habeas corpus that we cannot reach the full merits of the constitutional issue before us violates the Suspension Clause. We should hold that the Compulsory Process Clause, as interpreted in *Washington v. Texas,* provides the constitutional rule of decision and that its full application here does not conflict with any decision of the Supreme Court interpreting the Self-Incrimination Clause.

For the foregoing reasons, I dissent.

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[1] See the discussion of the history and meaning of the Constitution's Suspension Clause in the dissenting opinion of Justice Scalia, joined by Justice Stevens, in *Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S. Ct. 2633, 2660-74 (2004), and their admonition that:

> The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing.

Id [illegible] 2672 (emphasis in original).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANTA DAVIS,

Petitioner-Appellant,

v.

DENNIS STRAUB, Warden,

Respondent-Appellee.

No. 03-2262

Filed: April 21, 2006.

Before: MERRITT and ROGERS, Circuit Judges;
HOOD, Chief District Judge.*

AMENDED ORDER

This matter comes before the court upon the petition for rehearing *en banc,* filed by counsel for the appellant, and the response of the appellee thereto. The petition has been circulated not only to the original panel members but also to all other judges of the court in regular active service, less than a majority of whom have voted in favor of rehearing en banc. Accordingly, the petition has been returned to the panel for decision.

Upon consideration of the petition and the response, the panel concludes that the issues raised therein were fully considered upon the original submission and decision of the case, and the request for rehearing is therefore denied.

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* The Honorable Joseph M. Hood, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

BOYCE F. MARTIN, JR., Circuit Judge, with whom DAUGHTREY, MOORE, COLE, and CLAY, Circuit Judges, join, dissenting from the denial of rehearing en banc. I respectfully dissent from the denial of rehearing en banc in this case because I believe that this Court's recent decisions have adopted an overly narrow interpretation of the "unreasonable application" prong of AEDPA's Section 2254(d)(1). These decisions have rendered the "unreasonable application" prong indistinguishable from the "contrary to" prong and, in my opinion, such a narrow reading raises grave constitutional concerns and undermines the ability of the federal courts to reach the full merits of constitutional issues. This case is a prime example of the results of such an overly narrow reading of AEDPA. For these reasons and for the reasons so ably articulated by Judge Merritt in his dissent from the panel decision, *Davis v. Straub,* 430 F.3d 281, 291 (6th Cir. 2005) (Merritt, J., dissenting), I respectfully dissent from the Court's decision to deny rehearing en banc.

I.

Under AEDPA, we are limited to granting relief where a petitioner's state court "adjudication . . . was contrary to, or . . . an unreasonable application of, clearly established Federal [Supreme Court] law." 28 U.S.C. § 2254(d). This means that to determine what constitutes "clearly established" law, we look to the law established by Supreme Court holdings, and not its dicta. *Lakin v. Stine,* 431 F.3d 959 (6th Cir. 2005) (citing *Ruimveld v. Birkett,* 404 F.3d 1006, 1010 (6th Cir. 2005)); *see also Yarborough v. Alvarado,* 541

U.S. 652 (2004); *Williams v. Taylor,* 529 U.S. 362, 412 (2000). An explicit statement from the Supreme Court is not necessary; rather, "the legal principles and standards flowing from [Supreme Court] precedent" also qualify as "clearly established law." *Ruimveld,* 404 F.3d at 1010 (quoting *Taylor v. Withrow,* 288 F.3d 846, 852 (6th Cir. 2002)). Thus, "clearly established" law includes not only bright-line rules, but also "the governing legal principle or principles set forth by the Supreme Court" designed to apply to a range of factual contexts. *Lockyer v. Andrade,* 538 U.S. 63, 71 (2003); *see also Williams,* 529 U.S. at 407 (observing that an unreasonable application of clearly established federal law occurs when a state court decision "unreasonably refuses to extend [a legal] principle to a new context where it should apply"). "A legal principle, by definition, applies to diverse factual scenarios. And those factual scenarios can differ in innumerable ways, so long as they are analogous on the point to which the legal principle applies." *Robinson v. Polk,* ___ F.3d ___, 2006 WL 894971 (4th Cir. 2006) (King, J., dissenting from the denial of rehearing en banc); *see also Wiggins v. Smith,* 539 U.S. 510, 520 (2003) (holding that "a federal court may grant relief when a state court has misapplied a governing legal principle to a set of facts different from those of the case in which the principle was announced" (internal quotation marks omitted)). Consequently, federal courts have found clearly established law even where Supreme Court precedent does not rest factually "on all fours." *Lewis v. Johnson,* 359 F.3d 646, 655 (3d Cir. 2004); *Hart v. Attorney Gen. of the State of Florida,* 323 F.3d 884, 893 n.16 (11th Cir. 2003); *Burdine v. Johnson,* 262 F.3d 336, 354 (5th Cir. 2001); *Torres v. Prunty,* 223 F.3d 1103, 1110 (9th Cir. 2000).

Reading the "unreasonable application" clause of Section 2254(d)(1) to require the facts between cases to be on all fours would conflate the clause with the "contrary to" clause. *See Williams,* 529 U.S. at 405 (stating that the two clauses must be given "independent meaning"). The unreasonable application prong requires a more nuanced approach than the panel majority gives it and in the process, the Court has failed to give the clauses "independent meaning." *Id.* As Judge Merritt remarked, the panel majority's "approach apparently looks first at the facts of the case, extracts the narrowest possible legal rule to fit that situation, and then, upon predictably finding no Supreme Court precedent resting on all fours, uncovers no clearly established law." *Davis,* 430 F.3d at 294 (Merritt, J., dissenting). This limited inquiry is wrong. Because the facts of cases will always differ in some manner, where a state court "unreasonably refuses to extend [a legal] principle to a new context where it should apply," *Williams,* 529 U.S. at 407, that error will not necessarily "strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.,* 866 F.2d 228, 233 (7th Cir.1988). Instead, to determine the extent to which clearly established legal principles, such as the two principles in this case, apply to govern diverse factual scenarios, we must determine how general the principles are and whether they are applicable to new factual situations. Clearly established law does not mean "a case in the Supreme Court directly on point on the facts, just exactly like the case you have before you." *Davis,* 430 F.3d at 297 (Merritt, J., dissenting). Justice Kennedy characterized the proper inquiry, which has been adopted by the Court, in *Wright v. West,* 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring):

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

See also Davis, 430 F.3d at 292 (Merritt, J., dissenting) (acknowledging that the Supreme Court has adopted the "spectrum of abstraction of *Teague v. Lane,* 489 U.S. 288 (1989), to determine whether a particular legal principle was clearly established at the relevant time"). "Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough,* 541 U.S. at 664.

For example, as Judge Merritt discussed, the ineffective assistance of counsel standard is a broad rule whose application to new factual situations still constitutes clearly established law. Consequently, I think we can all agree that under the Supreme Court's jurisprudence, an attorney sleeping through trial would provide ineffective assistance of counsel. A case where the attorney listened to music on headphones or played video games during trial would likewise constitute ineffective assistance. We would not review the case and determine, as I believe the panel majority's approach would dictate, that the Supreme Court has not yet found that listening to music or playing video games during trial constitutes ineffective assistance of counsel and therefore find no clearly established federal law on point. This hypothetical illustrates the absurdity of the narrow approach and the constraints it imposes on federal courts' ability to remedy constitutional violations.

The result is that this Court's narrow reading of the unreasonable application prong offends the judicial power under Article III. Under this narrow approach, the Court's "case-by-case" view is turned on its head – now, it is not "the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent," *Wright,* 505 U.S. at 309 (Kennedy, J., concurring), but rather the infrequent case is the one where this Court finds any precedent on point. Such an approach yields the authority to interpret federal law to the state courts and uses Section 2254(d)(1) as a "crutch." *Davis,* 430 F.3d at 298 (Merritt, J., dissenting); *see also Williams,* 529 U.S. at 378-79 (Stevens, J., dissenting in part) ("At the core of [the judicial] power is the federal courts' independent responsibility – independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States – to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution."); *Cooper v. Aaron,* 358 U.S. 1, 18 (1958) (describing "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" as "a permanent and indispensable feature of our constitutional system"); *see also Robinson,* ___ F.3d ___, 2006 WL 894971 (King, J., dissenting from the denial of rehearing en banc) ("While I entirely agree that our review under AEDPA must be deferential, to read and apply AEDPA's provisions so narrowly is essentially to abdicate our responsibility to use the Great Writ when a state court has unreasonably applied clearly established federal law as determined by the Supreme Court."). Federal judges may only be umpires calling balls and strikes but Article III puts us in the game and behind home plate. This Court's reading of AEDPA relegates us to spectators with "no adjudicatory function to perform." *United States v. Klein,* 80 U.S. 128, 146-47 (1871); *United States v. Sioux Nation of Indians,* 448 U.S. 371, 392 (1980); *see also Yakus v. United States,* 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting); *Davis,* 430 F.3d at 297 (Merritt, J., dissenting) ("Such a reading of § 2254(d)(1) renders it unconstitutional by preventing our Court from giving our independent judgment on the legal effect of the evidence before us and by leaving us 'no adjudicatory function to perform.'"). This is hardly the judicial power authorized under the Constitution where "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 177 (1803).

Not only does this Court's reading of Section 2254(d)(1) offend Article III, but it also suspends the writ of habeas corpus in violation of Article I, Section 9 of the Constitution. This Court's interpretation of Section 2254(d)(1) "so broadly circumscribes the writ of habeas corpus that we cannot reach the full merits of the constitutional issue[s] before us." *Davis,* 430 F.3d at 299 (Merritt, J., dissenting). "The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing." *Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S. Ct. 2633, 2672 (2004) (Scalia, J., dissenting) (emphasis in original).[1] Under this Court's narrow standard the writ is available in theory but illusory in fact.

II.

In this case, a proper and constitutional interpretation of Section 2254(d)(1) would require the writ to issue. Two such clearly established principles apply here: (1) Under the Sixth Amendment, a state may not arbitrarily deny a defendant the right to call a witness whose testimony is relevant and material to the defense, *Washington v. Texas,* 388 U.S. 14, 23 (1967), and (2) a witness may not invoke the self-incrimination privilege unless the danger is "real and probable," not "imaginary and unsubstantial," *Brown*

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[1] In the *Federalist Paper No. 84,* by Alexander Hamilton, he wrote that:

> Independent of those [answers] which relate to the structure of the government, we find the following:. . . . Section 9 [Article I] clause 2 – "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. . . . " [T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instrument of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: . . . "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and, therefore a more dangerous engine of arbitrary government." And as a remedy for this fatal evil he [Blackstone] is everywhere peculiarly emphatical in his encomiums on the habeas-corpus act, which in one place he calls "the Bulwark of the British Constitution."

v. Walker, 161 U.S. 591, 608 (1896), and "where there can be no further incrimination, there is no basis for the assertion of the privilege," *Mitchell v. United States,* 526 U.S. 314, 326 (1999). The majority concluded that these principles were not clearly established because the Supreme Court has not applied them in a case with indistinguishable facts. This approach is contrary to Supreme Court precedent applying general principles to new factual situations and I would hold that the Michigan Court of Appeals' decision unreasonably applied clearly established federal law under the Fifth and Sixth Amendments.

A witness to the murders at issue, Jourdan, made a series of pre-trial statements which indisputably place Jourdan at the scene of the crime and strongly tend to exonerate petitioner Davis, who has consistently maintained his innocence. Jourdan's pre-trial statements place full blame on a person named Bell who has confessed to the murders. *See Davis,* 430 F.3d at 293 (Merritt, J., dissenting) ("It was clear from his statements that he had nothing to do with the murder and neither did Davis whose behavior Jourdan observed."). When Davis called Jourdan to the stand, the prosecutor brought to the court's attention Jourdan's Fifth Amendment privilege against self-incrimination. Jourdan exercised that privilege by refusing to testify. Jourdan was never threatened with prosecution. Even if he were threatened with prosecution, his prior statements would *already* be admissible against him – thus, his presence at the crime scene was already overwhelmingly established, and his testimony could do no further harm. Nevertheless, Jourdan was allowed to invoke the privilege. Davis was not permitted to introduce eyewitness testimony that probably would have exonerated him of the murders, in violation of his Sixth Amendment right to do so, and he was then convicted and sentenced to multiple concurrent life sentences.

The majority's narrow construction of AEDPA prevents this court from granting the writ of habeas corpus, despite the aforementioned "clearly established" principles that should be applied to require a new trial at which Davis would be allowed to put Jourdan's exculpatory testimony before the jury.

> As the Supreme Court foresaw in *Walker* and *Mitchell,* there reaches a point where a piece of evidence – in this case Jourdan's presence at the scene of the crime – which all parties agree is only incriminating in the most minimal and remote way, is so overwhelmingly and definitively established that it cannot be constitutionally used to stonewall introduction of other evidence that is highly exculpatory of a criminal defendant. The Fifth Amendment may not be so prompted and used as a shield for the flaw in the state's case, [or] used in such a mechanistic way that it subsumes a criminal defendant's Sixth Amendment right to present a defense.

Davis, 430 F.3d at 294 (Merritt, J., dissenting). The governing principles discussed above align this case with Supreme Court precedent, and it was unreasonable for the Michigan Court of Appeals to decline to apply it here.

III.

Judge Merritt said it best. "The majority's decision achieves the unfortunate trifecta of misapplying the Supreme Court's jurisprudence under 28 U.S.C. § 2254(d)(1), gutting the Article III judicial power while 'suspending' the writ of habeas corpus, and stranding a probably innocent inmate in prison for life." *Davis,* 430 F.3d at 291 (Merritt, J., dissenting). The Great Writ, what Blackstone called "the Bulwark of the British Constitution," the *only* writ named in the United States Constitution, is not deserving of such an undistinguished death. I dissent from the Court's decision denying rehearing en banc to correct these errors.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

421 F.3d 365

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANTA DAVIS, *Petitioner-Appellant,* *v.* DENNIS STRAUB, Warden, *Respondent-Appellee.*	No. 03-2262

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 02-73319 – Gerald E. Rosen, District Judge.

Argued: March 17, 2005

Decided and Filed: September 1, 2005

Before: MERRITT and ROGERS, Circuit Judges;
HOOD, Chief District Judge.*

COUNSEL

ARGUED: John R. Minock, CRAMER, MINOCK & GALLAGHER, Ann Arbor, Michigan, for Appellant. Janet A. Van Cleve, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** John R. Minock, CRAMER, MINOCK & GALLAGHER, Ann Arbor, Michigan, for Appellant. Janet A. Van Cleve, OFFICE OF

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* The Honorable Joseph M. Hood, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

MERRITT, J., delivered the opinion of the court, in which HOOD, D.J., joined. ROGERS, J. (pp. 10-12), delivered a separate opinion concurring in part and dissenting in part.

OPINION

MERRITT, Circuit Judge. This case arises from a petition for a writ of habeas corpus by prisoner Danta Davis, who was convicted, along with co-defendant Nathan Bell, for the murders of Sheila Jones and her two young children in 1996. It presents an interesting issue of conflict between a defendant's right to present a defense under the Sixth Amendment and a witness's right to invoke the Self-incrimination Clause. The trial court allowed a crucial defense witness to invoke a blanket assertion of his Fifth Amendment privilege and refuse to answer any questions at all. Both the Michigan Court of Appeals and the District Court found this approach to be in error but found it to be harmless. The District Court based this determination on the belief that even admitting his presence at the scene of the crime could incriminate the witness. However, this fact had already been clearly established and admitted by the witness in a properly *Mirandized* statement to police. As the Supreme Court has said, "where there can be no further incrimination, there is no basis for the assertion of the privilege." *Mitchell v. United States,* 526 U.S. 314, 326 (1999).

Both petitioner Davis and co-defendant Bell received multiple concurrent life sentences as well as additional sentences for home invasion, mutilation of a body and receiving and concealing stolen property. A magistrate judge recommended that Davis's habeas petition be dismissed; this recommendation was adopted by the District Court. We have granted Certificates of Appealability on three issues: 1) whether the trial court's decision to sustain a crucial defense witness's blanket invocation of his Fifth Amendment privilege denied Davis a fair trial and his right to present a defense, 2) whether Davis's trial counsel provided ineffective assistance by failing to offer into evidence prior exculpatory statements made by a witness who invoked his Fifth Amendment privilege not to testify, and 3) whether the manner in which the prosecutor raised Fifth Amendment concerns about a crucial defense witness amounted to prosecutorial misconduct and intimidation.

Summary of Facts

Sheila Jones and her two children, seven-year-old Darquelle Ray and four-year-old Shawanna Ray, were murdered on September 26, 1996. Jones was killed in the home of Davis's father, Jimmy Motley, while the children were killed in their own home, down the street from Motley's. Motley, the boyfriend of Jones, was in jail at the time of the murders. Davis, Bell and others were in Motley's home on the evening of September 26, when Motley called to speak with Jones, as he frequently did. Davis went down the street to Jones's home and brought her back to Motley's house, where she was killed later that evening. The children were killed soon thereafter.

Davis and Bell were tried in a joint trial before separate juries. The prosecution's theory of the case was that Davis and Bell cooperated in beating and killing Jones and her children. Davis's theory of the case was that Bell killed Jones and the children by himself and that Davis assisted only in disposing of Jones's body, which Davis admitted doing out of fear of retribution from Bell and his family if he refused. Bell confessed to the murders, but also attempted to incriminate Davis, while Davis maintains his innocence. Most of the witnesses implicating Davis were related to or affiliated with Bell. The record reflects no physical evidence linking Davis to the murders. In Davis's testimony at the trial, he claimed the only person (other than himself and Bell) in the house when Jones was being beaten was then fifteen-year-old Damaris Jourdan.[1]

Jourdan's pre-trial statements strongly tend to exonerate Davis of the murder. He made two statements to police approximately one week after the murders, on October 2, 1996, and October 3, 1996. Both Jourdan's mother and father were present for the first statement, which was not *Mirandized*. In that statement, Jourdan reported witnessing Bell, and Bell alone, beating, "stomping," and grabbing Jones by the neck, both inside the house and in the front yard and finally dragging her from the yard into the garage. Jourdan then reported leaving the area.

The day after his first statement, the police brought Jourdan and his mother back to the station for another interview. This time, they read him his rights "per the Miranda Warning Card, which he stated he waived." His mother was also informed of his rights. They then informed Jourdan that another suspect had implicated him in the crime. After waiving his right to remain silent and to have an attorney present, Jourdan denied any involvement in the murders. He reiterated his statement from the previous day and elaborated somewhat, stating that, just before leaving, he heard Jones breathing in the garage and saw Bell standing nearby holding a black and yellow handled screwdriver. Jourdan reportedly said to Bell, "Leave her alone," to which Bell responded, "She saw my face."

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[1] This name is sometimes spelled "Jordan" in the record.

Approximately ten months later, Jourdan gave a statement to a private investigator hired by Davis's defense counsel. This statement, while more detailed, is very consistent with the earlier ones given to police.[2] In addition to the details recited earlier, Jourdan reported that Bell told him that he planned on killing Jones's children (who were still in their home down the street), because they knew where their mother had gone. Bell reportedly attempted to get Jourdan's help in killing the children. Jourdan reported that he refused to help and walked off alone before Jones was killed. He repeatedly told the investigator that neither he nor Davis had hit or stabbed Jones at any time and that Davis was not even outside to witness the violence. His eyewitness account is consistent with Davis's testimony at trial. Jourdan's account exonerates himself and strongly tends to exonerate Davis of murder.

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[2] The record of Jourdan's statement to the private investigator is in question and answer format, similar to a trial transcript, while the statements to the police are summaries, apparently written by an officer present at the interviews.

Apparently unaware that either the prosecutor or the trial judge would prompt Jourdan to assert his Fifth Amendment privilege, Davis's defense counsel, Phillip Beauvais, identified Jourdan by name in his opening statement and told the jury to expect to hear him recount the version of events described above. During the trial, after Jourdan was called by the defense and sworn in as a witness, Prosecutor Arthur Busch requested a sidebar. The judge excused the jury and discussed the prosecutor's concerns on the record. Busch informed the court, within earshot of Jourdan, that Jourdan was a suspect in the case and should be informed of his Fifth Amendment rights before he testified. After questioning Jourdan briefly, the judge obtained counsel for him, who spoke with Jourdan and his parents and reviewed relevant documents. On advice of counsel appointed by the judge, Jourdan invoked his Fifth Amendment privilege against self-incrimination and refused to testify. The trial court did not follow the normal procedure of putting the witness on the stand and allowing him to invoke the privilege as to individual questions. *See Hoffman v. United States,* 341 U.S. 479, 486-87 (1951); *In re Morganroth v. Fitzsimmons,* 718 F.2d 161, 167 (6th Cir. 1983). Instead, the court allowed Jourdan not to testify or answer any questions at all, stating "whether or not he testifies is a choice that is his alone under these circumstances." This sparked a heated exchange between Davis's defense counsel and the prosecutor.

BEAUVAIS: I think what is happening today is that this young man is afraid that if he takes the stand and testifies truthfully and that truthful testimony will help Danta Davis that, in fact, the Prosecutor will then, as retribution for him testifying, will then charge him with a crime. I believe the only reason that this was brought forward at this particular time was to keep this young man from testifying. And I believe that because of that my client is being denied his right to a fair trial and is denied his right to have his witnesses appear, witnesses that can certainly exonerate this person.

* * *

BUSCH: This is not an intimidating thing, that is to try and protect the People's right, as well as Mr. Jourdan's right. Quite frankly, if we had our druthers, we would prefer him to testify in this matter because we think it would bring out the truth. But there is no – there is no merit to any allegation that our office somehow is involved in some intimidation of Mr. Jourdan. We have made it clear throughout, since this trial started, to defense counsel that at some point if [Jourdan] was to be summoned that he would need to have counsel and that there should be some discussion of that with this particular individual.

The trial continued without Jourdan's testimony, and both Davis and Bell were convicted and received multiple life sentences. No charges have been brought against Jourdan for the murders.

Davis made a motion for a new trial based, in part, on his objections to the handling of Jourdan's testimony by the prosecutor and trial judge. This resulted in an evidentiary hearing where both defense counsel Beauvais and prosecutor Busch testified regarding their discussions and actions about Jourdan leading up to the trial.

It is undisputed that the prosecutor never charged Jourdan with any participation in the crime. Busch testified that police had notified him that some evidence existed implicating Jourdan in the crime, primarily the testimony of Bell that Jourdan had also stabbed Jones. At the time of Davis's trial, however, Busch did not believe the case was strong enough to pursue charges against Jourdan, although he did allegedly make some additional efforts to develop the evidence after Davis's trial concluded. Busch testified that prior to Jourdan's appearance in court, he had had several conversations with Beauvais, at least once in chambers with the trial judge, wherein he raised his Fifth Amendment concerns and notified Beauvais of the need for Jourdan to have separate representation. Before issuing his order regarding the motion for a new trial, the judge reported that he remembered discussions in chambers about Jourdan before he was called, but could not remember the precise issues raised.

Beauvais repudiated Busch's account and claimed the only conversations they had had regarding Jourdan pertained to possible hearsay objections to his testimony. Furthermore, Beauvais testified that he would not have mentioned Jourdan by name in his opening statement, nor would he have called him to the stand in front of the jury, if the prosecutor or the court had made him aware of potential Fifth Amendment concerns. Jourdan's name appeared on both the defense and the prosecution's witness lists, which were exchanged long before trial. Beauvais, therefore, gave notice to the prosecutor of Jourdan's upcoming appearance and provided ample time for him to notify defense counsel of his concerns prior to opening statements.

The court denied Davis's motion for a new trial finding that defense counsel "knew or should have known – with emphasis on the should have known – that Mr. Jordan [sic] required some treatment outside the presence of the jury before he was called to the stand." It rejected his claim that the prosecutor had acted improperly or in an intimidating fashion by alerting the court of his constitutional concerns.

Davis then appealed to the Michigan Court of Appeals, which held that the trial judge had misstated the law in determining that the witness, not the court, could decide for himself if the privilege applied. Nevertheless, it affirmed the lower court's decision because "the trial court also found that there was a reasonable basis for Jordan [sic] to fear self-incrimination." *See* J.A. at 42 (*State v. Davis,* No. 207725 (Mich. Ct. App. Dec. 26, 2000) (unpublished), citing *People v. Dyer,* 425 Mich. 572, 578, 390 N.W.2d 645, 648-49 (1986)).

Davis properly and timely exhausted his claims in state court and then filed this petition for a writ of habeas corpus in federal district court. A magistrate judge issued a report and recommendation denying his petition, which was adopted by the District Court. In the report, the Magistrate Judge found that Jourdan's blanket assertion of the privilege did not provide grounds to grant the writ because "[e]ven his admission that he was present during the murder, although undisputed and not sufficient in itself to convict him of any crime, would be one link in the chain of evidence establishing his guilty [sic]."

Analysis

I.

Long ago, the Supreme Court held that, for a witness to invoke his Fifth Amendment privilege, the danger of self-incrimination must be "real and probable," not "imaginary and unsubstantial." *Brown v. Walker,* 161 U.S. 591, 608 (1896). This holding has never been overruled. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), habeas may be granted if a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." The state court's decision here was contrary to Supreme Court precedent.

As the Michigan Court of Appeals observed, the procedure used by the trial court was improper. We agree with this view of the case. The proper procedure would have been to put the witness on the stand and rule on the questions one at a time. *See Hoffman,* 341 U.S. at 486-87; *In re Morganroth,* 718 F.2d at 167. In this way, the court can address the question of whether the witness has "reasonable cause to apprehend danger" from answering specific questions. Only this approach can balance a defendant's right to present a defense, *see Washington v. Texas,* 388 U.S. 14, 19 (1967), with the privilege against self-incrimination. *See Hoffman,* 341 U.S. at 486 ("The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself – his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified .... To sustain the privilege, it need only be evident from the implications of *the question* [asked] ... that a responsive answer to *the question* or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.") (emphasis added). The Court has cabined the "reasonable cause" standard by stating that the privilege does not extend where the danger is of an "imaginary and unsubstantial character." *See Ohio v. Reiner,* 532 U.S. 17, 21 (2001) (per curiam). We find that, as to his potential testimony exculpating Davis, Jourdan did not have "reasonable cause to apprehend danger" of self-incrimination.

Due to the Court's serious concerns about the inherently coercive and involuntary nature of custodial interrogations, it has established "extraordinary" procedural safeguards to ensure individuals' Fifth Amendment rights are protected when they are questioned by police. *See Miranda v. Arizona,* 384 U.S. 436, 467-68 (1966); *Minnesota v. Murphy,* 465 U.S. 420, 430 (1984). Absent additional coercion or misconduct, an individual's decision to answer questions after receiving and understanding the prescribed *Miranda* warning, is considered not to have been "compelled" and whatever statement is made may be used against that individual in a later prosecution. *See Minnesota,* 465 U.S. at 429-30 ("But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so .... [T]he *Miranda* Court required the exclusion of incriminating statements obtained during custodial interrogation unless the suspect fails to claim the Fifth Amendment privilege after being suitably warned of his right to remain silent and of the consequences of his failure to assert it.").

In the instant case, the entire premise for allowing Jourdan to invoke a blanket assertion of his Fifth Amendment rights was his admission that he was present at the scene. The theory is that this fact could have been incriminating; and, therefore, any relevant information he might provide, even if it was exculpatory, would likewise be incriminating. But Jourdan's post-*Miranda* statement to police, which at the very least included an admission that he was present during the beating of Jones, would clearly be admissible against him were he to be criminally prosecuted for these murders, just as properly *Mirandized* confessions are admissible in subsequent prosecutions against the defendants who made them. *See Miranda,* 384 U.S. at 476-77. Jourdan's mother was present during the second interview, and she was also made aware of his rights. There is no indication that the police exerted any undue influence with respect to his decision not to remain silent. Nor did Jourdan request an attorney at any time. It is unreasonable to assert that disclosure of this well-established, undeniable fact during Davis's trial would have incriminated Jourdan any more than had already been done. As the Supreme Court has said, "where there can be no further incrimination, there is no basis for the assertion of the privilege." *Mitchell*, 526 U.S. at 326.

It is uncontroverted (by Jourdan or anyone else) that Jourdan was present at Motley's house on the evening of September 26, 1996. *See* J.A. at 61 (*Davis v. Straub,* No. 02-CV-73319-DT Mag. Judge Report & Recommendation (E.D. Mich. Aug. 14, 2003)) ("It was clear that Jordan [sic] was present at the scene of the crime"). In addition to his three statements (one given after he was *Mirandized*) that admitted his presence, both Bell and Davis reported his presence, as did several others who testified at the trial. There reaches a point where a piece of evidence, which all parties agree is only incriminating in the most minimal and remote way, is so overwhelmingly and definitively established that it cannot be constitutionally used to stonewall introduction of other evidence that is highly exculpatory of a criminal defendant. The Fifth Amendment may not be used in such a mechanistic manner that it subsumes a criminal defendant's Sixth Amendment right to present a defense, merely in order to avoid having a witness testify to a fact that is already clearly established and uncontroverted by the witness in his own previous *Mirandized* statement.[3]

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[3] In *Washington v. Texas*, 87 U.S. 14 (1967), the Supreme Court clearly established the Sixth Amendment right to present a defense:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.
>
> . . . .
>
> We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.

(Continued on following page)

This does not mean that Jourdan would be barred from asserting his Fifth Amendment privilege in response to any question at all. It merely means that admitting his presence at the scene could no longer provide a "reasonable basis to fear self-incrimination." Any damage had already been done by his prior, properly *Mirandized* statements to police. If Jourdan had taken the stand, we do not know for sure whether he would have admitted or denied his presence, testified in accord with his prior statements, or admitted his presence but then invoked the privilege with respect to additional questions. But, unlike cases where the individual invoking the privilege is also the defendant, in the instant case the Sixth Amendment creates a countervailing right in Davis that requires the court to compel Jourdan to respond to questions that raise only "imaginary and unsubstantial risk" of further incrimination. Questions regarding Jourdan's presence at the scene fall into this category, and it was a violation of Davis's Sixth Amendment rights not to compel him to respond to them.

It was, therefore, an unreasonable application of Supreme Court case law for the Michigan Court of Appeals to affirm the trial court's decision that Jourdan could avoid any questions because he had a reasonable basis to fear self-incrimination, and invoke a blanket assertion of the Fifth Amendment. If Jourdan had testified in a manner consistent with his prior statements then he would have provided a great deal of relevant, exculpatory (as to Davis), eyewitness testimony that in no way incriminated

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Id. at 19, 23. It is worth noting that the prosecution can easily avoid the self-incrimination problem by giving a witness like Jourdan immunity and calling him to the stand.

Jourdan. And if, in order to tell the truth, Jourdan would have had to testify in a manner that was inconsistent with his prior statements (e.g., admitting he stabbed Jones) then he could have properly invoked the privilege in response to specific questions and the trial judge could have evaluated each of his claims in a more particularized and constitutional manner.

Alternatively, a serious additional constitutional problem would arise if, contrary to our holding here, we were to conclude that the penal threat to Jourdan was sufficiently great to allow him to invoke his Fifth Amendment privilege. If we should agree with the Michigan court in that respect, it seems clear that Davis's counsel committed a serious error in failing, after the trial court's ruling, to offer Jourdan's three exculpatory statements in evidence as declarations against penal interest.

After the trial court prevented Jourdan's live testimony, defense counsel's failure to offer these statements, which counsel already had in hand and which strongly tended to exonerate Davis of the murder, surely constituted ineffective assistance of counsel. Had the statements come into evidence, the probability of a different outcome seems great. Jourdan was the only eyewitness other than Davis and Bell. His statements are strongly exculpatory. Counsel's opening statement and primary defense at the trial would have been confirmed as promised rather than remain unheard, unexplained and unproved to the jury. Few trial errors are more devastating to the accused than the failure to offer definitive evidence promised in the opening statement and anticipated by the jury.

The penal interest exception to the hearsay rule is well accepted under the Confrontation Clause, and the

Michigan Supreme Court has interpreted the exception broadly. In *People v. Barrera,* 547 N.W.2d 280, 287 (Mich. 1996), the Court held that the phrase "tended to subject" found in the rule, should be read as "includ[ing] a broad scope of inculpatory statements," that includes more than direct confessions and "need only be a 'brick in the wall' of proving the declarant's guilt."

In this case, the Michigan Court of Appeals rejected Davis's ineffective assistance of counsel claim under *Strickland v. Washington,* 466 U.S. 668 (1984), because it found that the failure to offer the statements was not prejudicial to Davis.[4] This ruling is unacceptable. Had counsel offered the statements tending to exonerate Davis, the trial court would have been governed by the broad interpretation that the Michigan Supreme Court has given to the penal interest exception to the hearsay rule. Instead, counsel never presented this documentary evidence to the trial court and never gave the jury an opportunity to consider the three exculpatory statements that were consistent with Davis's testimony and vital to the defense theory of the case. This runs directly counter to the principle announced by the Michigan Supreme Court when it discussed the penal interest exception:

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[4] The Michigan Court of Appeals' no-prejudice ruling, under state law and under *Strickland,* is purely hypothetical. The court did not review any ruling by the trial court on the penal interest exception because no trial court ever considered the admissibility of these statements. This fact distinguishes the instant case from those under *Estelle v. McGuire,* 502 U.S. 62 (1991), which prohibited federal habeas courts "inquir[ing] as to evidence that was *properly admitted or improperly excluded* under state law." *Johnson v. Karnes,* 198 F.3d 589, 593 n.3 (6th Cir. 1999) (emphasis added).

> [T]he defendant's right to present exculpatory evidence in his defense and the rationale and purpose underlying [the against penal interest exception,] of ensuring the admission of reliable evidence must reach a balance. We believe they may be viewed as having an inverse relationship: the more crucial the statement is to the defendant's theory of defense, the less corroboration a court may constitutionally require for its admission.

Barrera, 547 N.W.2d at 291.

Considering the facts of this case, the prosecution cannot have it both ways. It is unreasonable to claim both that Jourdan's testimony about what he witnessed threatened his penal interest to such a degree that it triggered the Fifth Amendment, while at the same time claiming that the statements were inadmissible as declarations against his penal interest. The two arguments are mutually inconsistent, especially when one considers the extent to which Davis's Sixth Amendment rights are also at stake. The prosecution's arguments are designed simply to prevent the jury from hearing the persuasive testimony of the only eyewitness in any form, either from the stand or in the form of written evidence. The effect of these arguments, which were accepted by the Michigan Court of Appeals, was to violate Davis's right to mount a defense or, in the alternative, to receive the effective assistance of counsel in doing so.

II.

In *Webb v. Texas,* 409 U.S. 95, 98 (1972), the Supreme Court established a standard for finding a constitutional violation for witness intimidation: "the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." The following year, we applied *Webb* to a case where the prosecutor sent a Secret Service agent to communicate *ex parte* with a potential witness and threaten prosecution if he testified. "[T]he Government's action here substantially interfered with any free and unhampered determination the witness might have made as to whether to testify and if so as to the content of such testimony." *United States v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973). The prosecutor's conduct in the instant case simply does not rise to the level of intimidation present in *Webb* and *Thomas*. Here, the prosecutor requested a sidebar with the judge, wherein he informed the court that the witness was a suspect and should be informed of his constitutional rights. The judge then proceeded to briefly question the witness and quickly appointed independent counsel to advise him of his rights. Neither the prosecutor's nor the judge's conduct was unconstitutional, especially considering the ethical obligation, imposed on prosecutors by the ABA's model guidelines, to

> advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a prosecutor to so advise a witness whenever the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution.

ABA Standards for the Administration of Criminal Justice § 3-3.2(b).

Regardless of the prosecutor's motives or the propriety of waiting until the witness was called to the stand to inform the court of his concerns, we cannot say that the Michigan Court of Appeals unreasonably applied Supreme Court precedent in its holding that the prosecutor did not intimidate Jourdan into invoking the privilege.

Conclusion

Accordingly, the judgment of the District Court is REVERSED and the cause is REMANDED with instructions to issue a conditional writ of habeas corpus requiring petitioner Davis to be released unless a new trial is initiated within one-hundred eighty days.

CONCURRING IN PART, DISSENTING IN PART

ROGERS, Circuit Judge, concurring in part and dissenting in part. Like the majority, I am troubled that in this case the jury did not hear eye-witness testimony that may well have strengthened Davis's case. Yet, under the limited review permitted by AEDPA, 28 U.S.C. § 2254 (2005), I am simply unable to conclude that the Michigan Court of Appeals' decision was contrary to, or an unreasonable application of, Supreme Court law. While I concur in Part II of the majority opinion, holding that no unconstitutional intimidation by the prosecution occurred, I respectfully dissent from the majority's holding that the state courts acted contrary to established Supreme Court law, either by permitting a witness to give a blanket assertion of his Fifth Amendment right against self-incrimination, or by finding no ineffective assistance of counsel when defense counsel failed to offer the same witness' prior out-of-court statements as declarations against interest.

The witness Jourdan invoked his Fifth Amendment right not to testify, after consulting with independent counsel, and without (as the majority agrees) unconstitutional intimidation by the prosecution. The trial court did not require Jourdan to take the stand and invoke his right in response to each question. The only way to hold that this procedure was "contrary to" established Supreme Court law is to determine that Supreme Court case law requires defense witnesses invoking the Fifth Amendment right against self-incrimination to take the stand and invoke the right on a question-by-question basis.

Such a rule doubtless has merit, *see In re Morganroth,* 718 F.2d 161, 167 (6th Cir. 1983), although it could be argued that the trial court should have discretion to permit blanket invocation of the right in appropriate circumstances.[1] But neither the petitioner nor the majority has cited a Supreme Court case holding that such a procedure is required for the benefit of criminal defendants.

The majority relies upon *Hoffman v. United States,* 341 U.S. 479, 486-87 (1951), but that case states no rule proscribing a blanket assertion of the privilege. In fact, *Hoffman upheld* the invocation of the privilege as to very preliminary questions. The opinion in Hoffman does state at one point, "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." 341 U.S. at 486-87. In context, the Court may have been simply admonishing trial courts to use their good judgment when determining whether a responsive answer would tend to incriminate the witness. *Id.* at 486. The sentence by its terms, and certainly in context, does not necessarily imply – and clearly does not hold – that defense witnesses must always take the stand in order to invoke the privilege. Indeed, the Court immediately followed by saying: "The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" *Id.* at 487 (citing *Ex parte Irvine,* 74 F. 954, 960 (C.C.S.D. Ohio 1896) (Taft, J.)).

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[1] Defendant suggests that the first question for Jourdan would have been: "Were you present?" A strong case can be made that such an initial question could properly warrant invocation of the privilege. *See Hoffman v. United States,* 341 U.S. 479 (1951). If so, it is arguably a pointless formality, within a trial court's discretion to forgo, to insist that the witness take the stand.

It is true that our circuit in *Morganroth, supra,* stated as follows:

> A blanket assertion of the privilege by a witness is not sufficient to meet the reasonable cause requirement and the privilege cannot be claimed in advance of the questions. The privilege must be asserted by a witness with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify. *See Hoffman,* 341 U.S. at 486-88.

718 F.2d at 167. The issue resolved in *Morganroth,* however, was not whether the invocation of the privilege required that the witness to take the stand. The witness in that case had in fact taken the stand. Instead, the issue was whether the witness "must supply personal statements . . .

or . . . evidence with respect to each question propounded to him to indicate the nature of the criminal charge which provides the basis for his fear of prosecution" in the particular context of possible incrimination for perjury. *Id.* at 169. Such a requirement was warranted where the witness feared incriminating himself of perjury by giving testimony inconsistent with prior sworn testimony, because "the incriminating nature of the answer is not evident from the implications of the question in the setting in which it is asked[.]" *Id.* Not only is this a different issue, but also the issue was raised in the context of an appeal by a witness from an order directing him to testify, not in the context of a criminal defendant's right to present testimony. The statement in *Morganroth* about blanket assertions and particular questions is thus at best dictum with respect to the issue presented in this case: whether a criminal defendant has a due process right to invoke the Fifth Amendment without taking the stand and responding to individual questions, regardless of the circumstances. In any event, AEDPA calls for us to interpret clearly established federal law, "as determined by the Supreme Court of the United States," not the United States Courts of Appeals. Indeed, the Supreme Court has considered that a state court may disagree with the law of its federal circuit: "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." *Mitchell v. Esparza,* 540 U.S. 12, 17 (2003).

The Supreme Court's decision in *Washington v. Texas,* 388 U.S. 14 (1967), also fails to warrant a grant of habeas corpus under AEDPA. It is true that, entirely outside the Fifth Amendment self-incrimination context, *Washington v. Texas* clearly established that, under the Sixth Amendment, a state may not arbitrarily deny a defendant the right to call a witness whose testimony is relevant and material to the defense. *Washington,* 388 U.S. at 19. The Michigan Court of Appeals' decision, however, was neither contrary to nor an unreasonable application of *Washington v. Texas.*

Washington v. Texas does not hold that a defendant has the right to present any and all witnesses. The Court addressed the limits of a defendant's right to call witnesses and held that a state cannot create "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief." *Id.* at 22. The Court proceeded to hold that Texas' rule against allowing purported accomplice testimony was an "absurdity." *Id.* Because the Court did not consider the question of a witness's Fifth Amendment privilege against self-incrimination anywhere in its opinion, it cannot be said that the Court created clearly established law against a blanket assertion of the privilege in that case. *See id.* at 23 n.21 ("Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination . . . , which [is] based on entirely different considerations from those underlying the common-law disqualifications for interest.").

This leaves only one remaining basis for granting the writ – that Davis received ineffective assistance of counsel when defense counsel failed to try to introduce Jourdan's prior unsworn statements into evidence. Constitutionally ineffective assistance of counsel requires both that defense counsel's services fell below that of a reasonably competent attorney and that the deficiency prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). To establish prejudice, it would be necessary to show that

Jourdan's prior unsworn statements were admissible. But the contrary was held by the Michigan Court of Appeals, which determined as a matter of state evidence law that Jourdan's prior statements would not have been admissible in any event. *See People v. Davis,* No. 207725, 2000 WL 33385391, at *3 (Mich. Ct. App. Dec. 26, 2000) (per curiam) ("[The statements] do not qualify as statements against penal interest for purposes of MRE 804(b)(3)."). We are bound by the state court's determination of its own law. *Hutchison v. Marshall,* 744 F.2d 44, 46 (6th Cir. 1984); *see also Vroman v. Brigano,* 346 F.3d 598, 604 (6th Cir. 2003); *Israfil v. Russell,* 276 F.3d 768, 771 (6th Cir. 2001); *Duffel v. Dutton,* 785 F.2d 131, 133 (6th Cir. 1986). Because we cannot logically grant the writ based on ineffective assistance of counsel without determining that the state court erred in its interpretation of its own law, we are constrained to uphold the district court's denial of the writ.

Finally, a different result is not required by the asserted tension between a constitutional holding that a witness may not be required to testify for fear of providing an incriminating statement and a state-law evidentiary holding that prior statements by the same witness were not admissible as statements against penal interest. The majority cites no authority for the proposition that these determinations are legal mirror-images of each other, and certainly the Supreme Court has not so held as a matter of constitutional law.

I therefore reach the conclusion that under AEDPA the writ was properly denied.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v.	No. 207725
DANTA J. DAVIS, Defendant-Appellant.	Genesee Circuit Court LC No. 97-000544-FC

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant and a codefendant, Nathan Bell, were tried jointly, before separate juries, on charges arising from the deaths of Sheila Jones and her two children, Darquelle Ray and Shawanna Ray. Defendant was convicted of first-degree premeditated murder of Sheila Jones, MCL 750.316(1)(a); MSA 28.548(1)(a); first-degree premeditated murder of Darquelle Ray, MCL 750.316(1)(a); MSA 28.548(1)(a); first-degree felony-murder of Darquelle Ray, MCL 750.316(1)(b); MSA 28.548(1)(b); first-degree premeditated murder of Shawanna Ray, MCL 750.316(1)(a); MSA 28.548(1)(a); first-degree felony-murder of Shawanna Ray, MCL 750.316(1)(b); MSA 28.548(1)(b); first-degree home invasion of a dwelling, MCL 750.110a(2); MSA 28.305(a)(2); disinterment and mutilation of Sheila Jones' body, MCL 750.160; MSA 28.357; and receiving or concealing stolen property, MCL 750.535; MSA 28.803. Defendant was sentenced to concurrent terms of life imprisonment without parole for each of the first-degree murder convictions, six to ten years for the mutilation of a body conviction, three to five years for the receiving or concealing stolen property conviction, and a consecutive term of thirteen to twenty years' imprisonment for the home invasion conviction. Bell was convicted of the same eight counts except that he was convicted of unlawful driving away a motor vehicle rather than receiving or concealing stolen property. This Court affirmed Bell's convictions, but remanded the case for resentencing. *People v. Bell*, unpublished per curiam opinion of the Court of Appeals, issued August 10, 1999 (Docket No. 207548). Defendant appeals of right. We affirm, but remand for correction of the judgment of sentence.

Defendant raises several issues involving Damaris Jordan,[6] a proposed defense witness, who asserted the privilege against self-incrimination at trial. Jordan was at defendant's father's house with defendant and codefendant Bell on the evening in question and when Sheila Jones was beaten. Jordan gave two pretrial statements, one to the police shortly after the homicides and another to a private investigator just before trial. The statements corroborated defendant's claim that codefendant Bell alone beat Jones and dragged her to the garage. The prosecutor had subpoenaed Jordan for the preliminary examination, but did not call him as a witness. Both sides listed Jordan as a witness for trial, and his pretrial statements had been exchanged in discovery.

Defendant's motion for a new trial argued that the prosecutor had intimidated Jordan into asserting his privilege against self-incrimination, that trial counsel was ineffective for failing to move for the admission of Jordan's pretrial statements pursuant to MRE 804(b)(3) or (6), that the prosecutor denied him a fair trial by not granting Jordan immunity, and that the trial court erred by refusing to compel Jordan to testify. Following an evidentiary hearing, the trial court rejected each of these claims and denied defendant's motion for a new trial.

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[6] The trial transcript spells this name as Demaris Jourdan.

The decision whether to grant a new trial is within the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones (On Remand)*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Defendant first claims that a new trial is warranted because the prosecutor intimidated Jordan into not testifying at trial. We disagree. The Fifth Amendment states, in pertinent part, that "No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. A witness may invoke this exception to the government's power to compel testimony in a criminal, civil, administrative, or legislative proceeding and choose to remain silent. *Kastigar v United States*, 406 US 441, 444-445; 92 S Ct 1653, 32 L Ed 2d 212 (1972); *People v Cheatham*, 453 Mich 1, 10, n 12; 551 NW2d 355 (1996). When a witness asserts the privilege against self-incrimination, the focus is on the consequences that a truthful answer might disclose. *Zicarelli v New Jersey State Comm of Investigation*, 406 US 472; 92 S Ct 1670; 32 L Ed 2d 234 (1972). However, attempts by the prosecutor to intimidate proposed defense witnesses from testifying, if successful, may constitute a denial of a defendant's right to due process of law. See *People v Hooper*, 157 Mich App 669, 674-675; 403 NW2d 605 (1987). When a trial court finds that it is necessary to inform a witness of his Fifth Amendment rights, the court should do so out of the presence of the jury. *People v Dyer*, 425 Mich 572, 578, n 5; 390 NW2d 645 (1986); *People v Clark*, 172 Mich App 407, 416; 432 NW2d 726 (1988); *People v Callington*, 123 Mich App 301, 307; 333 NW2d 260 (1983).

Contrary to defendant's claim, the instant case is clearly distinguishable from *People v. Butler*, 30 Mich App 561; 186 NW2d 786 (1971). In *Butler*, this Court, reversing the defendant's conviction, found that the defendant was denied due process of law when the prosecutor intimidated a potential defense witness by telling him outside the courtroom that he was under investigation, regardless of whether he testified at the trial, and advising him of his right not to testify. In the instant case, the prosecutor properly informed the trial court that Jordan, a proposed defense witness, was a suspect in the case and, therefore, should be advised of his constitutional right not to incriminate himself. As the trial court noted, there had been testimony in the prosecution's case in chief implicating Jordan. There had also been testimony at the preliminary examination implicating Jordan. We find no error.

We also reject defendant's claim that trial counsel was ineffective for not requesting admission of Jordan's pretrial statements under MRE 804(b)(3) or (6).

To establish ineffective assistance of counsel, defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability that, but for any unprofessional error, the outcome of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant must also overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Although Jordan's pretrial statements place him at the crime scene and inculpate codefendant Bell in the murder of Jones, they do not disclose a statement that is "probative of an element of a crime" and do not otherwise subject him to criminal liability. Accordingly, they do not qualify as statements against his penal interest for purposes of MRE 804(b)(3); *People v Barrera*, 451 Mich 261, 267; 547 NW2d 280 (1996); *People v Ortiz-Kehoe*, 237 Mich App 508, 517-518; 603 NW2d 802 (1999). That Jordan was allowed to invoke his privilege against self-incrimination is not inherently inconsistent with a determination that the statements in question are not against Jordan's penal interest.

Defendant has also failed to demonstrate that, under the totality of the circumstances, Jordan's statements bear inherent guarantees of trustworthiness so as to justify their admission under the "catch-all" exception to the hearsay rule. MRE 804(b)(6); *People v Welch*, 226 Mich App 461; 574 NW2d 682 (1997). As the trial court observed, the statements were made to the police and a private investigator at a time when there was "pressure . . . to put his best foot forward and not incriminate himself."

Accordingly, defendant has failed to demonstrate that defense counsel was ineffective for not seeking admission of Jordan's pretrial statements under either MRE 804(b)(3) or (6).

Next, because the prosecutor had no duty to grant immunity to witness Jordan, *People v Lawton*, 196 Mich

App 341, 346; 492 NW2d 810 (1992), the trial court did not abuse its discretion in denying defendant's motion for a new trial on this basis.

Regarding the trial court's decision to allow Jordan to invoke the privilege against self-incrimination, while the trial court improperly stated that Jordan had a constitutional right not to testify if he believed that his testimony would be self-incriminating, the trial court also found that there was a reasonable basis for Jordan to fear self-incrimination, especially during questioning on cross-examination, and the record amply supports this determination. Thus, the trial court did not err in refusing to compel Jordan to testify. *Dyer, supra* at 578.

Defendant also raises two double jeopardy issues. First, we agree that defendant is entitled to have his first-degree home invasion conviction and sentence vacated where that conviction also served as the predicate felony for the felony-murder convictions. *People v Wilder*, 411 Mich 328, 342-347; 308 NW2d 112 (1981); *People v Warren*, 228 Mich App 336, 354-355; 578 NW2d 692 (1998) aff'd in part, rev'd in part 462 Mich 415; 615 NW2d 691 (2000). Second, with respect to the deaths of the two children, the trial court shall modify the judgment of sentence to reflect that defendant was convicted of one count of first-degree murder for each death, each conviction being supported by two theories: premeditated murder and felony-murder. *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998).

Affirmed, but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

630 N.W.2d 621

(The decision of the Court is referenced in the North Western Reporter in a table captioned "Supreme Court of Michigan Applications for Leave to Appeal.")

Supreme Court of Michigan

People
v.
Danta J. Davis

NO. 118657. COA No. 207725.
June 26, 2001

Disposition: Application for leave to appeal from the December 26, 2000 decision of the Court of Appeals is DENIED.

No. 03-2262

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANTA DAVIS,
Petitioner-Appellant,
v.
DENNIS STRAUB,
Respondent-Appellee.

ORDER
(Filed Mar. 30, 2006)

BEFORE: MERRITT and ROGERS, Circuit Judges; and HOOD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

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* Hon. Joseph M. Hood, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk